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# TRANSCRIPT OF RECORD.

161-57

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1893.**

No. ~~370~~ 76 14

CHARLES C. HARRISON, WILLIAM W. FRAZIER, ALFRED C. HARRISON, WILLIAM W. HARRISON, AND MITCHELL HARRISON, COPARTNERS TRADING UNDER THE FIRM NAME OF HARRISON, FRAZIER & CO., PLAINTIFFS IN ERROR,

*vs.*

HERMANN FORTLAGE, AUGUST MOLLMANN, AND ROBERT MESTERN, PARTNERS UNDER THE FIRM NAME OF A. TESDORPF & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

**FILED JANUARY 14, 1891.**

**(14,454.)**

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1 UNITED STATES, } *set:*
*Eastern District of Pennsylvania,* }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between Hermann Fortlage, August Mollmann, aliens and subjects of the Queen of Great Britain, and Robert Mestern, alien and subject of the Emperer of Germany, partners under the firm name of A. Tesdorpf and Company, plaintiffs, and Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison, citizens of the State of Pennsylvania, copartners trading under the firm name of Harrison, Frazier and Company, defendants in a plea of assumpsit, a manifest error has intervened, to the great damage of the said Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Seal U. S. Circuit Court, E. D. Pennsylvania.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this thirty-first day of December, A. D. one thousand eight hundred and ninety, and in the one hundred and fifteenth year of the Independence of the said United States.

SAMUEL BELL,
*Clerk of Circuit Court U. S.*

2 THE UNITED STATES OF AMERICA, *ss:*

To Hermann Fortlage, August Mollmann, aliens and subjects of the Queen of Great Britain, and Robert Mestern, alien and subject of the Emperer of Germany, partners under the firm name of *a* A. Tesdorpf and Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the

eastern district of Pennsylvania, in the third circuit, wherein Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison, citizens of the State of Pennsylvania, copartners under the firm name of Harrison, Frazier and Company, — plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this second day of January, in the year of our Lord one thousand eight hundred and ninety-one.

WM. BUTLER, *Judge.*

Service of above citation upon the said Hermann Fortlage, August Mollmann, and Robert Mestern personally is hereby admitted.

January 7th, 1891.

BUTLER, STILLMAN & HUBBARD,
*Attorneys for said Defendants in Error.*

3 In the — Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

| | |
|---|---|
| HERMAN FORTLAGE, AUGUST MÖLLMANN, Aliens and Subjects of the Queen of Great Britain, and Robert Mestern, Alien and a Subject of the Emperor of Germany, Partners under the Firm Name of A. Tesdorpf and Company, | |
| *vs.* | No. 31. |
| CHARLES C. HARRISON, WILLIAM W. FRAZIER, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison, Citizens of the State of Pennsylvania, Partners Trading under the Firm Name of Harrison, Frazier and Company. | April Session, 1890. |

UNITED STATES OF AMERICA, } *ss:*
*Eastern District of Pennsylvania,* }

Pleas and proceedings before the honorable the judges of
4 the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1890, No. 31.

It is thus contained:

Be it remembered that on the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety, Herman Fortlage, August Möllmann, and Robert Mestern, partners under the firm name of A. Tesdorpf and Company, by their attorneys, Messrs. Butler, Stillman and Hubbard, come into court here and sues forth therefrom a writ of summons against Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and

Mitchell Harrison, partners trading under the firm name of Harrison, Frazier and Company, which, with the endorsement and return thereto, is in the words and figures following, to wit:

5 UNITED STATES, )
*Eastern District of Pennsylvania,* ) *sct:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison, citizens of the State [SEAL.] of Pennsylvania, partners trading under the firm name of Harrison, Frazier and Company, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia on the first Monday of May next, to answer to Herman Fortlage, August Möllmann, aliens and subjects of the Queen of Great Britain, and Robert Mestern, alien and a subject of the Emperor of Germany, partners under the firm name of A. Tesdorpf and Company, in a plea of assumpsit.

And have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 22nd day of April, A. D. 1890, and in the 114th year of the Independence of the United States.

SAMUEL BELL,
*Clerk of Circuit Court U. S.*

6 [Endorsed:] No. 31. Circuit court, April session, 1890. Fortlage *et al. vs.* Harrison *et al.* Summons. Assumpsit. Filed April 22, 1890. Returnable on the first Monday of May next. Butler, Stillman & Hubbard, attorney- for plaintiff-.

I accept service of the within writ for all the defendants, and the clerk will enter my appearance.

R. C. McMURTIE,
Per JOHN RODGERS.

Ap'l 22, 1890.

7 And afterwards, to wit, on the 22nd day of April, A. D. 1890, the plaintiffs, by their attorneys, come into court here and file their statement of complaint in the words and figures following, to wit:

Circuit Court of the United States for the Eastern District of Pennsylvania.

HERMANN FORTLAGE, AUGUST MOLLMANN, and ROBERT MESTERN, Plaintiffs,
*against*
CHARLES C. HARRISON, WILLIAM W. FRAZIER, ALFRED C. HARRISON, WILLIAM W. HARRISON, and MITCHELL HARRISON, Defendants.

The plaintiffs above named, by Butler, Stillman & Hubbard, their attorneys, complain against the above-named defendants as follows:

First. At all the times hereinafter mentioned the plaintiffs above named were, ever since have been, and still are copartners doing business in London, England, and Hamburg, Germany, under the firm name of A. Tesdorpf & Co., the said Hermann Fort-
8 lage and August Mollman aliens residing in London and being citizens of and subjects of the Queen of Great Britain, and the said Robert Mestern an alien residing in Hamburg and being a citizen of the Empire and a subject of the Emperor of Germany.

Second. Upon information and belief at all the time hereinafter mentioned the defendants above named were, ever since have been, and still are citizens of the United States of America and of the State of Pennsylvania and residing in the eastern district of Pennsylvania and copartners doing business in the city of Philadelphia under the firm name of Harrison, Frazier & Co.

Third. On the 22nd day of June, at the city of New York, the plaintiffs, by their agent duly authorized thereto, made a sale of a lot of sugar to the defendants pursuant to certain written terms of sale then and there given to the defendants and by them accepted, of which the following is a true and correct copy, to wit:

9 "NEW YORK, *June 22nd*, 1889.

"Messrs. Harrison, Frazier & Co., Philadelphia.

"DEAR SIRS: I have this day sold you, for account of Mess. A. Tesdorpf, of London, about twenty-five hundred tons superior Iloilo sugars, usual assortment ($\frac{1}{8}$ No. 1, $\frac{1}{4}$ No. 2, and $\frac{5}{8}$ No. 3), shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer 'Empress of India,' at $5\frac{3}{8}$c. per pound *ex* ship, net landed weights, two per cent. tare, cash, less $2\frac{1}{2}$ per cent. in ten days from average date of discharge.

"Sea-damaged, if any, to be taken at a fair allowance.

"No arrival, no sale.

"Should the steamer, through any unfor-seen circumstance, such as accidents of the seas, stress of weather, &c., be unable to load these sugars within the time specified, and the sellers cannot secure other steam tonnage to load in June, this contract is to be void.

"Yours truly,

G. G. BAUER,
"Pp. A. LUEDER.

10 Fourth. Upon information and belief the sugars specified in the said memorandum were at that time in course of shipment on the said steamer "Empress of India," at Illilo, in the Philippine island, and the shipment was there completed in the amount, quality, and assortment and within the time specified in the said terms of sale, and thereupon the said steamer sailed from Iloilo, via the Suez canal, for Philadelphia.

Fifth. Upon information and belief the steamer upon the said voyage encountered collisions and other perils of the sea which caused delays and damage to her and damage to and some loss of cargo, and in January, 1890, in the prosecution of her voyage put into the Bermudas as a port of refuge and there her master, acting under the advice and instructions of surveyors, discharged about seven hundred tons of the said cargo to lighten his vessel sufficiently to enable her to proceed upon her voyage with safety in her condition, damaged as aforesaid. The master of said steamer then secured other tonnage, to wit, the steamer "Trinidad," to carry forward the said seven hundred tons of sugar to Philadelphia and proceeded on his voyage with the remainder of the cargo and arrived in Philadelphia.

11 Sixth. Thereafter and before the arrival of the steamer "Trinidad" the plaintiffs, in due form, tendered to the defendants, at Philadelphia, under the said sale of June 22nd, 1889, the sugars which arrived there in the "Empress of India," with notice that delivery of the sugars forwarded by the "Trinidad" would, on arrival in Philadelphia, be likewise tendered to the defendants; but the defendants refused to accept the said sugars or any portion thereof.

Seventh. Thereupon the plaintiffs and defendants entered into an agreement in writing, of which the following is a copy, to wit:

"In the Matter of the Contract of June 22, 1889, between A. Tesdorpf & Co., of London, and Harrison, Frazier & Co., of Philadelphia, Relative to a Sale of about 2,500 Tons of Superior Iloilo Sugar.

"The sellers since the arrival of the 'Empress of India' made a tender of the sugar on board, acceptance of which was refused.

"Thereupon the parties agreed:

12 "The sellers may sell the sugar on board the 'Empress of India' to ascertain the difference between the selling price and the value on arrival. The sellers, if they shall tender the residue of the original cargo at a future day, or so much as may arrive, shall be deemed to be in the same position as if they held the sugar now on the 'Empress of India' until the arrival of such residue of the original cargo, and then tendered the whole that shall have arrived; the parties agreeing to this to save the expense of handling and storage or demurrage incident to such delay.

"The sale may be a private sale, Harrison, Frazier & Co. having an option to take at the price proposed and the sale when made to

be deemed a sale at auction for the account of whom it may concern after due notice.

"February 19th, 1890.

"HARRISON, FRAZIER & CO.
"A. LUEDER,
"*Agent for A. Tesdorpf & Co.*"

The plaintiffs then sold the sugar arrived on the "Empress of India" for the purposes and pursuant to the terms of said agreement for the sum of $138,306.08, which was at that time the best price obtainable.

13 Eighth. Thereafter and on or about the 3rd day of March, 1890, the said sugars discharged by the master of the "Empress of India" at Bermuda as aforesaid and forwarded by him to Philadelphia arrived in Philadelphia on the steamer "Trinidad," and the plaintiffs then in due form tendered delivery of the same to the defendants under the said sale of June 22nd, 1889, and the subsequent contract and transactions hereinbefore set forth, but the defendants refused to accept the same or any portion thereof.

Ninth. Thereupon the plaintiffs and defendants entered into an agreement in writing, of which the following is a copy, to wit:

"It is agreed that the sugar per mail steamer "Trinidad," which arrived today, shall be sold to Harrison, Frazier & Co. by A. Lueder, representing A. Tesdorpf & Co., of London, on terms they agree on, and this shall for all purposes connected with the contract between them of June 22nd last be deemed to have been a sale at public auction on due notice to Harrison, Frazier & Co. and no objection made by them to the terms.

Philadelphia, March 3rd, 1890.

14 HARRISON, FRAZIER & CO.
A. LUEDER,
*Agent for A. Tesdorpf & Co., of London.*"

The plaintiffs then sold the said sugars, pursuant to the terms of said agreement, for $63,619.22, which was at that time the best price obtainable.

Tenth. The said contract of June 22nd, 1889, was in all things duly performed by the plaintiffs and the tender of delivery of the sugars to the defendants was in all respects complete and in accordance with the custom of merchants relating to contracts, as the contract hereinbefore averred.

Eleventh. Upon information and belief the net weight of the sugars of which delivery was tendered by the plaintiffs to the defendants at Philadelphia was 4,833,788 pounds, net, and the average date of discharge of said sugars was March 1st, by reason of which facts the defendants became liable to pay to the plaintiffs, under the terms of the sale of June 22nd, 1889, the sum of $265,023.38 on March 11th, 1890. Upon refusal of the defendants to receive the said sugars they were sold, as hereinbefore stated, for $201,925.30,

with average date of payment therefor on March 11th, 1890,
15 to the loss of the plaintiffs in the sum of $63,098.08, with interest thereon from March 11th, 1890, for which sum demand has been made by the plaintiffs upon the defendants, but the defendants refuse to pay the same or any part thereof.

Wherefore the plaintiffs demand judgment against the defendants for the said sum of sixty-three thousand and ninety-eight $\frac{8}{100}$ dollars, with interest thereon from the 11th day of March, 1890, and the costs of this action, and they pray that process issue accordingly.

BUTLER, STILLMAN & HUBBARD,
*Plaintiffs' Attorneys, 54 Wall St., New York City.*

CITY AND COUNTY OF NEW YORK, } ss.:
*Southern District of New York,* }

August Lueder, being duly sworn, says that he is the agent and attorney-in-fact in the United States of the plaintiffs; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the sources of
16 his information upon which his belief as to those matters is founded are the original papers under which the said sugars were shipped and reports made by the officers and agents of the steamer "Empress of India" respecting the voyage of the steamer and reports made to him in regular course of business by employees and correspondents, which papers and reports he believes to be true; that the plaintiffs reside in London, England, and Hamburg, Germany, and are now there and not within the United States; wherefore this verification is made by him at their request and by their authority and not by one of the plaintiffs.

AUGUST LUEDER.

Sworn to before me this 19th day of April, 1890.

GEORGE CROMWELL,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in N. Y. Co.

STATE OF NEW YORK, } ss.:
*City and County of New York,* }

I, Edward F. Reilly, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that George Cromwell has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Richmond with his autograph, and was at the time of taking the annexed deposition duly authorized to take the same, and that I
[SEAL.] am well acquainted with the handwriting of said notary public and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 19th day of April, 1890.

EDWARD F. REILLY, *Clerk.*

17 Endorsed: 31. April sess., 1890. U. S. circuit court. Hermann Fortlage and others ag'st Charles C. Harrison and o'rs. Original complaint. Butler, Stillman & Hubbard, attorneys for plaintiffs, 54 Wall street, New York. Filed Apr. 22, 1890. Samuel Bell, clerk.

18 And afterwards, to wit, on the 14th day of May, A. D. 1890, the defendants, by their attorney, comes into court here and file their affidavit of defence, which, being read, is in the words and figures following, to wit:

A. TESDORPF & Co. *vs.* HARRISON, FRAZIER & Co. } C. C. U. S., E. D. Pa., April, 1890. No. 31.

W. W. Frazier, one of the defendants, being duly sworn, says:

The defendants are advised they have a legal defence to the action, the nature and character of which is as follows:

They were at the time the contract mentioned in the declaration was made sugar-refiners. They bought this cargo to supply their refinery with raw sugar to be manufactured. This was known to the sellers.

The usual length of the voyage is two months and one week. Early in July they were informed by the sellers' agent that the vessel was expected to arrive not later than September 1. Another vessel loading at the same place sixty days later arrived September 3rd, 1889. The Empress of India arrived February 12, 1890, and then without having on board the goods purchased to be loaded on and delivered by that vessel.

19 In July the defendants, having no insurable interest in the sugar, insured at a large premium their anticipated profits on the contract. The price had not fallen to the cost of the sugar until within the earlier half of August, and at the time the vessel in ordinary circumstances would have arrived the depreciation was comparatively small. All the loss claimed by the plaintiffs on the sugar that arrived has resulted from the fall in the market value since the sale.

They further aver that owing to defects in the boilers of the Empress of India that vessel did not reach Aden, on the Red sea, until August 3rd. By reason of the defects of the boilers it became necessary to repair the same, and for this purpose to unload the cargo, which was done, and the ship taken to Alexandria and repaired. She then returned to Aden and reloaded the cargo and proceeded on her voyage. The vessel, for some cause unknown to defendants, proceeded to Bermuda, unloaded part of her cargo, about seven hundred tons, and came with the residue to Philadelphia.

The sellers had informed the defendants when the ship was at Aden that they had no right under the contract to tranship the

cargo or to send it on by another vessel. The defendants
20 refused to receive the sugar brought by the Empress of India to Philadelphia, where it arrived on the 12th February, 1890, because the tender of the goods was not a good tender under the contract set out in the declaration, and there was no other contract between the plaintiffs and defendants.

It is not disputed that the proper disposition was made of the cargo on the defendants' refusal to accept. If the tender was a valid tender, they admit they are liable for the difference between the selling and the contract price, as stated in the declaration.

They insist that it is implied in such a contract that the goods will be delivered within a reasonable time. The usual time was not later than September 1 or two months and eight days after loading. The actual time was seven months and fifteen days. The vessel arrived at Aden August 3 and did not sail thence till November 30, being detained nearly four months repairing.

The ship did not arrive with the cargo, and therefore the contract was not complied with. The cargo was in part landed and stored at Bermuda to the extent of seven hundred tons, and
21 after some delay shipped by another vessel to Philadelphia, and these acts made it impossible for the sellers to perform their contract, and they did not perform the same, whereby the deants were discharged.

The residue of the sugar, viz., seven hundred tons, was loaded on the St. Trinidad at Bermuda and arrived at Philadelphia March 3, 1890, and was tendered to the defendants under the contract and refused by them. If that tender was proper tender it is not disputed that the proper disposition was made of it by the sellers, and that the defendants are liable for the difference between the selling and the purchasing price, as stated in the declaration.

The defendants are advised and aver this tender was not a legal tender under the contract. The defendants were not bound to accept any sugar under that contract except sugar brought by the Empress of India and loaded on her at the time and place stipulated.

The defendants do not refer to the delay of the voyage as a substantive ground of defence. But they do insist that as the contract shows time was made important or of the essence of the contract a delay exceeding threefold the usual and expected time must
22 be taken into account in considering whether the performance as tendered was a performance as stipulated and whether a performance which could not be demands- by the defendants can be compulsory on them, thereby making the contract based on mutual promises optional on the part of one of them.

The defendants therefore aver—

(1.) The plaintiffs have not performed their contract.

(2.) They have not offered to perform the same.

(3.) The defendants are not in default for not paying for the sugar mentioned in the contract, and therefore no cause of action exists against them on that contract.

W. W. FRAZIER.

Sworn and subscribed before me this 12th day of May, 1890.

JOHN RODGERS,

[SEAL.] *Notary Public.*

Endorsed: 31. Ap'l, 1890. C. C. U. S. E. D. Pa. A. Tesdorpf & Co. *vs.* Harrison, Frazier & Co. Affidavit of defence. Filed May 14, 1890. Samuel Bell, clerk. McMurtrie.

23 And afterwards, to wit, on the 28th day of May, A. D. 1890, the defendants, by their attorney, comes into court here and files, by consent, an amendment to affidavit of defence, which, being read, is in the words and figures following, to wit:

Circuit Court of the United States, Eastern District of Pennsylvania.

HERMAN FORTLAGE, AUGUST MOLLMAN, and ROBERT MESTERN, Partners Trading under the Firm Name of Tesdorpf & Company,

*against*

CHARLES C. HARRISON and Others, Trading under the Firm Name of Harrison, Frazier & Company.

It is hereby consented and stipulated that the affidavit of defence may be amended as follows:

Strike out on page 2 the words on the second line "they further aver" down to and including the words on the eighth line "and proceeded on her voyage," and in place and *and* stead thereof insert the following: "By reason of stress of weather the boilers were out of order and the vessel put into Port Said and awaited orders some days, and while there at anchor was run into and so damaged that she could not proceed without repairing. To do this it was necessary to unload and store the cargo, which was done, and the ship taken to Alexandria and repaired. She then returned
24 to Port Said and reloaded the cargo and proceeded on her voyage."

And that it be further amended by striking out on the third page on lines 2 and 3 the following words, to wit, "arrived at Aden August 3rd, and did not sail thence until November 30."

Dated New York, May 26th, 1890.

BUTLER, STILLMAN & HUBBARD,
*Att'ys for Pl'ffs.*

R. C. McMURTRIE, *For Def'd'ts.*

Endorsed: 31. Ap'l, 1890. C. C. U. S. Tesdorpf & Co. *vs.* Harrison. Amendment to affidavit of defence. Filed May 28, 1890. Samuel Bell, clerk. McMurtrie.

25 And afterwards, to wit, on the 3rd day of June, A. D. 1890, the defendants, by their attorney, comes into court here and files their plea; which, being read, is in the words and figures following, to wit:

Circuit Court of the United States, Eastern District of Pennsylvania.

TESDORPF & Co. *vs.* HARRISON. } April Sess., 1890. No. 31.

The def'd'ts plead non-assump*sit*.

R. C. McMURTRIE, *For Def'd'ts.*

June 3, '90.

Endorsed: 31. April, 1890. C. C. U. S., E. D. of Pa. Tesdorpf *vs.* Harrison. Plea. Filed Jun- 4, 1890. Samuel Bell, clerk.

26 And thereupon it is ordered that a jury come to try the issue joined in this case.

And afterwards, to wit, on the 4th day of December, A. D. 1890, came the parties aforesaid, and the jurors of the jury aforesaid being called likewise came, to wit, Charles H. Kirlbaum, Frederick Carpenter, Henry C. Stout, Leonard H. Kennard, Stanley B. Haddock, George C. Jackson, William Graydon, Joseph Pyle, Edward Wolf, James S. Coates, Eli M. Fox, Milton C. Bowman, who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this case.

And afterwards, to wit, on the 5th day of December, A. D. 1890, the jurors aforesaid upon their oaths or affirmations aforesaid respectively do say that they find for the plaintiffs and assess the damages at sixty-five thousand eight hundred and eighty-four dollars and nineteen cents ($65,884.19).

27 And thereupon, forasmuch as the court now here is not as yet advised about giving judgment of and upon the premises, day is therefore given to the said parties to be before the court in four days, to wit, on the ninth day of December, in the year aforesaid, for hearing judgment of and upon the premises, because the said court here is not yet advised thereupon.

28 Afterwards, to wit, on the 11th day of December, A. D. 1890, before the judges of said court, comes the said Herman Fortlage, August Möllmann, and Robert Mestern, by their attorneys, Messrs. Butler, Hubbard and Stillman, whereupon, the premises being seen and fully understood by the court here and mature deliberation being had thereon, it is considered that the said Herman Fortlage, August Möllmann, and Robert Mestern do recover from the said Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison their damages aforesaid found by the jurors in form aforesaid, to wit, sixty-five thousand eight hundred and eighty-four dollars and nineteen cents ($65,884.91).

Whereupon judgment is entered accordingly.

29 And afterwards, to wit, on the nineteenth day of December, A. D. 1890, the defendants, by their attorney, file the following bill of exceptions, to wit:

Be it remembered that in the April sessions of A. D. 1890 came Herman Fortlage *et al.* into the circuit court of the U. S. for the eastern district of Penn. and impleaded Charles C. Harrison *et al.* in a certain plea of assumpsit, &c., in which the said plaintiffs declared (*pro ut narr.*) and the said defendants pleaded (*pro ut* pleas), and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city of Philadelphia before the Honorable Wm. Butler, an associate judge of the said court, on Thursday, the fourth day of December, A. D. 1890, the aforesaid issue between the said parties came to be tried by a jury of the said circuit for that purpose duly impannelled (*pro ut* list of jurors), at which day came as well the said plaintiff- as the said defendant-, by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial
30 the counsel of the said plaintiffs called AUGUST LUEDER, who, having been duly sworn, said:

I am in the commission and agency business, # 101 Wall street, New York city, dealing principally in sugar, making sales by the cargo and sales by lots. I know Messrs. A. Tesdorpf & Company, London, the plaintiffs. Messrs. Fortlage, Mollman and Mestern compose the firm. They reside in London, and the latter in Hamburg. They are citizens of those countries. I am their agent. I was acting as such in the matter of the cargo of the steamer "Empress of India." I had negotiations going on for some time with the defendants, principally through their representative in New York, Mr. Newhall, and myself verbally, which finally led to the contract as it was made in writing. That was a contract dated the 22d of June, 1889. That is a copy of it.

The contract is as follows:

"NEW YORK, *June* 22, 1889.

Messrs. Harrison, Frazier & Co., Philadelphia.

DEAR SIRS: I have this day sold you for account of Messrs. A. Tessdorpf & Company, of London, about twenty-five hundred tons of superior Iloilo sugars, usual assortment, one-eighth No. 1, one-fourth No. 2, and five-eighths No. 3, shipping or to be shipped during this month from the Philippines to Philadelphia per steamer 'Empress of India,' at five and five-eighths cents per pound *ex* ship, net landed weights, two per cent. tare, cash less two and one-
31 third cents in ten days from average date of discharge.

(Sea-damaged, if any, to be taken at a fair allowance.)

(No arrival no sale.)

Should the steamer through any unfor-seen circumstances, such as accidents of the seas, stress of weather, &c., be unable to load

these sugars within the time specified and the sellers cannot secure other steam tonnage to load in June, this contract is to be void.

(Signed) A. LEUDER."

The contract, *which* with its acceptance, was put in evidence.

The "Empress of India" afterwards arrived in Philadelphia about the middle of February.

Q. Upon her arrival did you have any communication with Messrs. Harrison, Frazier & Company?

A. I wrote to Messrs. Harrison, Frazier & Company, tendering them the cargo on board that steamer.

Q. Under what date?

A. The 15th of February. This is a copy of what I wrote them.

Letter from A. Lueder to Harrison, Frazier & Company, dated New York, February 15, 1890, which was read in evidence:

"NEW YORK, 15*th February*, 1890.

Messrs. Harrison, Frazier & Co., Philadelphia.

GENTLEMEN: In June last the S. S. 'Empress of India' took on board in Iloilo about 68,703 bags of Superior Iloilo sugar, of which 8,288 were No. 1, weighing net 4,500 piculs; 16,101 were No. 2,
32 weighing net 9,000 piculs, and 44,314 were No. 3, weighing net 22,500 piculs, being the cargo sold by me on account of Messrs. A. Tesdorpf & Co., of London, to you under date of June 22, 1889.

The steamer, as I have heretofore informed you, met with certain disasters which necessitated her discharging and making repairs in Egypt, after which she reloaded her cargo and proceeded to Philadelphia. She and her cargo again, as I am informed, met with sea damage, which caused her to seek Bermuda as a port of distress, where the master of the steamer, under the recommendations of surveyors, discharged about 22,000 bags of the sugars to lighten his vessel sufficiently to enable her to resume her voyage with safety.

Such sugars were stored by the master in Bermuda and will, as I understand, be forwarded to destination by him.

The steamer resumed her voyage and has now arrived in Philadelphia and is ready to discharge the remaining sugars, as you have been heretofore notified by Messrs. John F. Craig & Co., of your city.

I, on behalf of my principals, am ready to make and hereby tender to you a delivery of such sugars under the contract. Will you please designate the wharf where you desire the steamer to discharge, and inform me, or rather Messrs. John F. Craig & Co., whether you prefer to take the sugars in bond or duty paid? If in bond, of course, proper allowance will be made in the payments you make. I will at once, on receiving your instructions respect-
33 ing this, do whatever is necessary to conform thereto.

Messrs. John F. Craig & Co. will act for me in Philadelphia.

When the sugars left at Bermuda come forward I will tender delivery of them to you under the contract. I am informed that arrangements have been made to forward them by the steamer 'Trinidad,' expected to sail from Bermuda for Philadelphia about the 27th inst.

Very truly yours,
(Signed) A. LUEDER."

34 Q. Did you receive a reply?

A. I received from Harrison, Frazier & Company a reply dated February 17th.

Letter dated Philadelphia, February 17th, 1890, from Harrison, Frazier & Company to Lueder, which was read in evidence:

"PHILADELPHIA, *February* 17, 1890.

A. Lueder, Esq., 101 Wall St., New York.

DEAR SIR: We acknowledge receipt of your favor of the 15th inst.

We have already communicated to you through Messrs. J. F. Craig & Co. a reply to what we supposed to be a tender by them of the sugar which arrived by the 'Empress of India.'

We decline accepting this as a performance of the contract. As to any informality in the tender, we observe none and do not propose to make any objection on that score.

Seeing what you say as to the intended shipment from Bermuda of the cargo left there, while we do not think we are bound to state what we may do at any future time, we think that in fairness we ought to say that this will not, in our opinion, be a compliance with the contract, and we will not accept it as such.

Should you desire to negotiate for the disposition of the cargo, to relieve whoever must suffer from this disaster, we are quite willing to do so, reserving to each party every right intact as to which shall bear the loss.

Very truly,
(Signed) HARRISON, FRAZIER & CO."

35 Q. After that correspondence did you enter into any agreement with Messrs. Harrison, Frazier & Company respecting this cargo (handing paper to witness)?

A. On the 19th of February we entered into an agreement, of which this is the original.

Agreement between plaintiff and defendant and Lueder, dated February 19, 1890, which was read in evidence:

"In the Matter of the Contract of June 22, 1889, 'between A. TESDORPF & Co., of London, and HARRISON, FRAZIER & Co.,' of Philadelphia, Relative to a Sale of about 2,500 'Tons Superior Iloio Sugar.'

"The sellers since the arrival of the 'Empress of India' made a tender of the sugar on board, acceptance of 'which was refused.'

"Thereupon the parties agreed:

"The sellers may sell the sugar on board the 'Empress of India' to ascertain the difference between the selling price and the value on arrival. The sellers, if they shall tender the residue of the original cargo at a future day, or so much as may arrive shall be deemed to be in the same position as if they held the sugar, now on the 'Empress of India' until the arrival of such residue of the orig-nal cargo, and then tendered the whole that shall have arrived; the parties agreeing to this to save the expense of handling and storage or demurrage incident to such delay.

"The sale may be at private sale, Harrison, Frazier & Co. having an option to take at the price proposed and the sale when made to be deemed a sale at auction for account of whom it may concern after due notice.

"February 19th, 1890.

"HARRISON, FRAZIER & CO.
"A. LUEDER,
"*Agent for A. Tesdorpf & Co.*"

36 Q. Did you make a sale of those sugars under this arrangement?

A. I did; on the same date.

Q. Is this the contract of sale (handing paper to witness)?

A. That is the contract.

Contract of sale dated Philadelphia, February 19, 1890, which was read in evidence.

PHILADELPHIA, *19th February*, 1890.

Sold for account of whom it may concern and in pursuance of the terms provided for in the agreement signed this date by Messrs. Harrison, Frazier & Co., of Philadelphia, and Mr. A. Lueder, of New York, as agent for Messrs. A. Tesdorpf & Co., of London, all the sugar on board the S. S. "Empress of India," now at anchor in this port, and estimated at about 47,000 bags on the following terms:

1. Buyers to provide at once a berth for the steamer where she can commence discharging forthwith.

2. The price for the sound sugar is to be 4¼c. per lb., basis 82°, allowance $\frac{1}{16}$c. up and $\frac{1}{16}$ down per degree, fractions in proportion, "*ex* ship," net*t* landed weights, 2% tare guaranteed; and the sea-damaged sugar, if there be any, is to be taken at a fair allowance on the above price, said allowance to be determined by Messrs. John F. Craig & Co., brokers, of this city, and Mr. William Brockie, agent for the underwriters at Lloyds; subject, however, to the approval of both buyers and seller.

3. The sugar to be paid for in cash, less 2⅛%, in ten days from average date of discharge; buyers to advance, if required by seller, the necessary money for duty at 6% interest per annum.

(Signed) A. LUEDER,
*Agent for A. Tesdorpf & Co., of London.*

"Accepted.
"HARRISON, FRAZIER & CO."

37 Q. Was that sale consummated?

A. Yes, sir; the sale was consummated and the sugar delivered.

Q. What were the proceeds of such sale? The amount that was paid you by Harrison, Frazier & Company under this contract of sale?

A. By the Empress of India, $138,306.08.

Q. How many bags came forward by the "Empress of India"?

A. 47,510 bags of sound sugar and 264 damaged.

Q. What were the grades of sugar in that?

A. As far as we could ascertain by separation there were 6,401 bags No. 1, 11,512 No. 2, and 29,597 No. 3.

Q. Can you tell me what those sugars would have brought under the original contract?

A. Under the original contract those sugars would have brought $181,991.76.

Q. When was the discharge of those sugars on the "Empress of India" begun and when was it completed?

A. It commenced on the 20th of February and finished on the 5th of March.

Q. Making an average date of when?

A. The 28th of February.

Q. Do you know of the arrival of the other sugars and by what steamer they came forward?

A. The "Trinidad" arrived on the 3d of March.

Q. On the arrival of the "Trinidad" did you have any correspondence with Messrs. Harrison, Frazier & Company?

38 A. I wrote them, tendering again that sugar that came forward by the "Trinidad." This is a copy of the letter I wrote them:

"MARCH 3, 1890.

Messrs. Harrison, Frazier & Co.

GENTLEMEN: The S. S. "Trinidad" has arrived in Philadelphia with the sugars (about 22,000 bags) which the S. S. "Empress of India" left at Bermuda, and is now ready to discharge them.

I, on behalf of my principals, am ready to make and hereby tender to you a delivery of such sugar under the contract of June 22, 1889. In doing so I refer to the correspondence which has already passed between us since the arrival of the "Empress of India" and the written agreements we have made and under which we have acted.

I am ready to deliver the sugars in bond or duty paid, as may be preferred.

Very truly yours,

(Signed) A. LUEDER.

Messrs. John F. Craig & Co., of Phila., will act for me in the delivery of the sug."

39 Q. Did you have a reply to that letter?

A. Yes, sir; this is the reply that Harrison, Frazier & Company sent me on the date *date* (producing letter).

Letter dated March 3d, 1890, from Harrison, Frazier & Company to Leuder read in evidence.

"MARCH 3, 1890.

Mr. A. Lueder, New York.

DEAR SIR: We acknowledge receipt of your favor of this day, tendering us the sugar arrived by the mail S. S. "Trinidad."

We decline accepting this as a performance of the contract. We make no objection because of any informality, for we have noticed none.

We are, as we were on the arrival of the "Empress of India," prepared to negotiate for the disposition of the sugar to relieve whoever must suffer by the disaster, reserving to each party whatever rights they would have if the usual course were pursued of the seller selling upon our refusal to accept.

Yours truly,

(Signed) HARRISON, FRAZIER & CO."

40 Q. Did you thereupon make any formal agreement with them?

A. We made a formal agreement, the same as in the case of the "Empress of India," on the same date.

Agreement read in evidence, dated March 3, 1890.

"It is agreed that the sugar per mail S. S. "Trinidad," which arrived today, shall be sold to Harrison, Frazier & Co. by Mr. A. Lueder, representing A. Tesdorpf & Co., of London, on terms they agree on, and this shall for all purposes connected with the contract between them of June 22 last be deemed to have been a sale at public auction on due notice to Harrison, Frazier & Co. and no objection made by them to the terms.

(Signed) A. LUEDER.
*Agent for A. Tesdorpf & Co., of London.*

(Signed) HARRISON, FRAZIER & CO.

Phila., March 3, 1890."

41 The WITNESS: This is a contract for the sale of the sugars on board of the "Trinidad."

"PHILADELPHIA, *3rd March*, 1890.

Sold, for account of whom it may concern and in pursuance of the terms provided for in the agreement signed this date by Messrs. Harrison, Frazier & Co., of Philadelphia, and Mr. A. Lueder, of New York, as agent for Messrs. A. Tesdorpf & Co., of London, all the sugar arrived on board S. S. "Trinidad" from and left at Bermuda by the S. S. "Empress of India," and estimated at about 22,000 bags, on the following terms:

1st. The sugars to be received by buyers where they are.

2nd. The price for the sound sugar is to be 4$\frac{3}{8}$c., basis 82°, allowance $\frac{1}{16}$c. up and $\frac{1}{16}$c. down per lb. per degree, fractions in proportion, "*ex* ship" nett landed weights, 2% tare guaranteed, and the sea-damaged sugar, if there be any, is to be taken at a fair al-

lowance on the above price, said allowance to be determined by Messrs. John F. Craig & Co., brokers, of this city, and Mr. Wm. Brockie, agent for the underwriters at Lloyds, subject, however, to the approval of both buyers and sellers.

3rd. The sugar to be paid for in cash, less $2\frac{1}{8}\%$, in 10 days from average date of discharge; buyers to advance, if required by seller, the necessary funds for duty, at 6% interest p. a.

(Signed) A. LUEDER,

*Agent for A. Tesdorpf & Co., of London.*"

"Accepted.

HARRISON, FRAZIER & CO."

42 Q. Was that sale consummated?

A. That sale was consummated by the delivery of the sugar.

Q. What was the amount realized upon such sale?

A. $63,619.22.

Q. What was the weight of the sugar?

A. The net weight of the sound sugar was 1,425,666 pounds. The weight of the damaged sugar was 94,080 pounds, net.

Q. What would these sugars have realized under the terms of the contract?

A. $83,031.62.

Q. When did the "Trinidad's" discharge begin and when did it end?

A. It began on the 3d of March and ended on the 5th of March, making an average date of the 4th.

Q. Taking the two lots together, that which came forward by the "Empress of India" and that which came forward by the "Trinidad," what was the average date of discharge of the whole of it?

A. The 28th of February.

Q. Were these second sales that were made to Messrs. Harrison, Frazier & Company made at the market rates substantially?

A. Yes, sir; both sales were made at the market price at the time of sale.

Q. By whom were those sugars forwarded from Bermuda?

43 A. By the captain of the "Empress of India."

Q. Did you have anything to do with it?

A. Nothing at all.

Q. Did you have anything to do with breaking the cargo at Bermuda?

A. I did not.

Q. Did you ever assent to it?

A. I did not.

Q. Or did the plaintiffs, to your knowledge?

A. They did not.

Q. The original contract provided for shipment of sugars in usual assortments in three grades of sugar, No. 1, No. 2, and No. 3. Is there any difference in the value of those grades?

A. There is a difference. I should say about five-eighths of a

cent difference between No. 1 and No. 3 and one-fourth to three-eighths of a cent difference between No. 2 and No. 3.

Q. Which is the most valuable?

A. No. 1.

Q. Which is the next most valuable?

A. No. 2, and the poorest No. 3.

Q. Their distinction of grade depends upon what?

A. It depends upon the color and the saccharine qualities.

Q. In your dealings as commission merchant you make sales how frequently and in what cities?

A. I make sales in New York principally, of course, and
44 Philadelphia and Boston and a few other sugar places.

Q. Have you a large business?

A. It depends. Sometimes a large business and sometimes less.

Q. You have had how long an experience in this business?

A. Since 1877.

Q. When a contract is made for the sale of sugars or other merchandise at a price *ex* ship, what does that mean?

(Objected to, as the contract speaks for itself.)

The COURT: I understand the object is to show that it is a technical term with a well-known signification among merchants.

Mr. MYNDERSE: Yes, sir.

Mr. MCMURTRIE: If Mr. Lueder means to say it has a meaning in the trade different from what it expresses on its face, that is another thing. I assume it is to explain the meaning of the phrase.

(Objection overruled. Exception for defendants.)

A. In the sugar trade we understand by making a sale *ex* ship that the seller pays the freight and the duty, and that the buyer assumes all the landing charges as soon as the sugar leaves the ship's tackle.

Q. When a price is agreed upon for merchandise *ex* ship, is that the significance of the phrase among merchants?

A. That is the significance of the phrase in the sugar business.

The COURT: It signifies what?

45 A. That the seller pays the freight and duty, and that all the landing charges are assumed by the buyer as soon as the sugar leaves the ship's tackle.

Q. It indicates where the responsibilities of the seller for charges terminate and where those of the buyer begin?

A. Just so.

Cross-examination:

Q. *Ex* ship means, of course, *ex* ship by which it is dispatched?

A. By which it arrives, not by which it is dispatched.

Q. Did you mean by what that *ex* ship meant *ex* the charges of the ship or outside of the ship?

A. Outside of the ship—the charges incurred after the sugar leaves the ship's tackle.

Q. "*Ex*" means on leaving the ship?

A. Yes, sir.

Q. *Ex* ship means the ship by which the cargo is dispatched, does it not?

A. From which it arrives.

Q. Where have you ever heard that meaning applied?

A. That seems to be the natural meaning.

Q. That is merely your interpretation of it without any regard to any application of the term in the trade, is it?

A. *Ex* ship means by the ship in which it arrives.

Q. Are you now giving a meaning in the trade or are you giving your interpretation of the contract?

A. That is the meaning in the trade.

46 Q. Where have you ever heard that meaning applied in the trade? Where has ever a controversy arisen or the question been discussed in the trade?

A. I do not think it is open for discussion at all. You cannot discharge anything unless it is brought here or brought to a port.

Q. Have you ever known of any discussion in the trade or any question arising in the trade which has caused the word to be interpreted in the way you have interpreted it?

A. I cannot cite you any example. I do not think that the question has ever been brought up.

Q. When the captain left Bermuda on the 9th of January and came to New York you had a conversation with him, did you not?

A. Yes, sir. I communicated with him through Mr. Craig, and also had a letter served on him.

Q. When he came from Bermuda to New York?

A. No; I had no communication with him when he came from Bermuda.

Q. Did he cable you in any way or did you learn in any way from him on his arrival at Bermuda with his ship in distress?

A. No; I did not.

Q. You were aware of the fact or, at least, you subsequently became aware of the fact that the captain left Bermuda and came to New York in January. Is not that so?

47 A. I was so informed by the agent of the captain here in Philadelphia, Messrs. Peter Wright & Sons.

Q. He never called upon you or communicated with you after his arrival in New York orally or by letter?

A. No, sir.

Q. Or with any agent of yours?

A. No, sir.

Q. Were you aware at the time that he was in New York?

A. I was aware when he went back to Bermuda, because I was so told by Peter Wright & Sons.

Q. You had not heard until he had gone back to Bermuda that he had been in New York?

A. I said before that I heard through Peter Wright & Sons that the captain was in Philadelphia; had arrived from Bermuda and was in Philadelphia.

Q. Who informed you of that?

A. Peter Wright & Sons through Messrs. Craig.

Q. Did they or the captain ask you to communicate with him in any way or to receive communications from him?

A. No, sir; nothing particular.

Q. What that was — not particular, but still amounted to a communication?

A. There was a communication. I notified him that there was a protest that part of the cargo should be discharged in Bermuda.

Q. You did?

A. I did.

Q. Who notified you?

48 A. I notified the captain that I had received orders from London to notify him to that effect; that it was protested that he should discharge any cargo in Bermuda.

By the COURT:

Q. The discharge of the cargo at Bermuda was protested against?

A. Yes, sir.

Q. That was by cable? I take it for granted to Bermuda.

A. Yes, sir; by cable.

Q. Have you with you a copy of that cable?

A. No, sir; I have not. It was in a letter I sent to the captain while he was here in Philadelphia. I got a cable from London by which I notified the captain that it was protested that he should discharge any cargo in Bermuda.

Q. That was in consequence of London instructions, was it not?

A. Yes, sir.

Q. From your principals in London, the Tessdorpf's house?

A. Yes, sir.

Q. How did you communicate to the captain those instructions; by cable to Bermuda or letter to Philadelphia?

A. Letter to Philadelphia. The captain was in Philadelphia.

Q. Have you a copy of that letter with you?

A. I have not.

49 Q. Then I may take it that the discharge by the captain in Bermuda of a part of his cargo was under your protest or the protest of your principals communicated through you?

A. I do not know. The captain followed his own judgment and followed the advice of the surveyors.

Q. Was this protest of yours or your principals before or after the discharge?

A. It was before, when the captain was here in Philadelphia; when he came up from Bermuda.

Q. We have distinctly this fact: That before the discharge your principals through you protested against that discharge in Bermuda?

A. Yes, sir. It was protested possibly by the underwriters. The underwriters were also directly interested in the matter.

Q. I understood you a moment since that it was from your principals in London that the cable protest came which you communicated?

A. Yes, sir.

By the COURT:

Q. That was before the cargo was discharged in Bermuda?

A. Yes, sir.

Q. So that what was subsequently done by the captain in the way of discharge of his cargo was done against the protest of your principals?

A. I suppose so.

Q. The sending forward, therefore, of the cargo in the way it was sent forward, part in the "Empress of India" and part in
50 the "Trinidad," was done by the captain of the vessel against your instructions or protest, was it not?

A. I suppose so.

Q. Did you at any time learn that this vessel was unseaworthy to carry forward her cargo from Bermuda to Philadelphia?

(Objected to as immaterial and irrelevant.)

The defendants then said: We wish to show the attitude of the principals towards this cargo and see whether or not what was done was done with the instructions and assent of the principals or against that assent, and we want to push the transaction to its end and find out whether the witness had heard that the vessel was unseaworthy for carrying forward her cargo, and if after he so heard he persisted in his protest.

(Objection renewed. Objection sustained. Exception for defendant.)

Q. (Showing letter dated September 17, 1889, to witness.) Is that your letter?

A. Yes, sir.

Q. Written to the defendant after this contract and while the thing was going on?

A. Yes, sir.

Q. Read that passage (indicating) (a copy is on the bill of exceptions below) and say whether or not you have any explanation to make or remarks to make on the subject of that letter?

A. I should think I should read the whole letter. (Witness reads letter.)

51 Q. Have you any explanation or remark to make after having read that letter?

A. None at all.

Q. Had you any knowledge whether the discharge of the sugars at Bermuda was actually begun or not prior to the date of your letter to the master of the "Empress of India"?

A. No; I have no positive knowledge about that.

Q. Can you give us the date of your letter?

A. I cannot. It was some time in January.

Q. Was it about the middle or before the middle? How long after the arrival in Bermuda did you send this thing?

A. I sent that letter after I got notice from Peter Wright & Sons that the captain of the steamer was in Philadelphia—the captain, not the vessel. The captain had come here by steamer.

Q. Did you send it to him to Philadelphia while he was here?
A. I requested Mr. Craig to send him a notice to that effect.
Q. Protesting against the discharge?
A. Yes, sir.
Q. You made this protest under cable instructions from London, emanating from whom?
A. The instructions came from A. Tessdorpf & Company, and were mixed up with certain offering on the part of the underwriters; so, undoubtedly, the instructions were given by order of the underwriters.
52 Q. Do you know for what purpose?
A. I suppose for the sake of avoiding these heavy expenses in Bermuda. If I recollect aright, the underwriters offered to pay the towage of the steamer to Philadelphia.

The plaintiffs then called JOHN F. CRAIG, who, having been duly sworn, said:

I am a merchandise, or sugar and molasses, broker in Philadelphia. I have been in my present office since 1860, in that line of business—selling sugars in the cargo and in lot.
Q. Have you had large dealings in the way of selling sugars to arrive in this country from foreign countries?
A. We have had; yes, sir; to a certain extent.
Q. Have you had occasion, in making these sales, to fix a price *ex* ship?
A. We have.
Q. What is the significance of that phrase among merchants when a price is fixed *ex* ship?

(Objected to. Objection overruled. Exception for defendant.)

A. When the price is *ex* ship, the understanding is that from the time the goods leave the tackle of the vessel they pass to
53 the buyer, and all expense incurred after that time is borne by the buyer.
Q. And up to that time they leave the tackle of the ship what?
A. They are the seller's goods.
Q. And he bears all expenses up to that moment?
A. He bears the expenses up to that time if the price is long price. In this case it was *ex* ship.

Cross-examination:

Q. That marks the change. Up to the time they leave the tackle they are the seller's?
A. Up to the time they are delivered from the vessel's tackle they are the seller's goods, but after that they are the buyer's goods.
Q. To what ship does that relate?
A. The ship from which it is delivered.
Q. And that ship, where there is one specified in the contract, is the ship that takes, is it not?

A. Not always. We have had cases where in case of distress they have come in other vessels and they were accepted under the term *ex* ship sale from the other vessels bringing the goods.

Q. How often did that occur?

A. I remember, I think, one or two instances at the present time. I could recall more if I had time.

Q. There was a case where there was no controversy arose?

54 A. We have discussed it as brokers quite frequently with the buyer.

Q. Your whole experience in the matter is confined to two instances?

A. In cases where distress caused a shipment of a part of the cargo by another vessel than the one named in the sale contract.

Q. Your whole experience is confined, as far as you can recall now, to two cases?

A. Those are recent cases. Yes, sir. I recall those, but I have no doubt I could remember others if I was at the office and could refer to my books.

Q. Do you recall any case in which a dispute arose and there was any determination of it among men in the trade?

A. There was no occasion for any dispute. The broker discussed it with the buyer and he accepted that understanding of *ex* ship.

Plaintiffs' counsel read in evidence stipulation made and signed by counsel for defendant- and plaintiff- in this action as follows:

It is hereby consented and stipulated that the sugars specified in the memorandum of sale dated June 22nd, 1889, and set forth in the third paragraph of the complaint herein, were at that time in course of shipment upon the steamer "Empress" of India," at Iloilo, in the Philippine islands, and that the shipment was there completed for Philadelphia in the amount, quality, and assortment and within the time specified in the terms of said memorandum.

July 23, 1890.

(Signed) BUTLER, STILLMAN AND HUBBARD,
*For Pl'ffs.*

R. C. McMURTRIE, *For Def'd'ts.*

55 Also stipulation between counsel as follows:

It is hereby consented and stipulated that the protest of John Dewar, master of the S. S. "Empress of India" and other officers and crew of the said steamer extended before W. K. Shope, a notary public in and for the city of Philadelphia, in the State of Pennsylvania, on the 14th day of March, 1890, be considered as a deposition of the said John Dewar, taken on behalf of the plaintiffs herein, and that the said document or duly certified copy thereof may be read upon the trial of this cause by either party in the same manner and with the same force and effect as if taken as a deposition in regular course.

July 23rd, 1890.

BUTLER, STILLMAN & HUBBARD,
*For Plaintiffs.*

R. C. McMURTRIE, *For Defendant-.*

56 Counsel for pl'ff- also read protest:

UNITED STATES OF AMERICA.

STATE OF PENNSYLVANIA, } ss:
*City of Philadelphia,* }

By this public instrument of declaration and protest be it known and made manifest to all whom it may concern that on the 12th day of February, in the year of our Lord one thousand eight hundred and ninety, before J. W. Hampton, Jr., personally appeared John Dewar, master of the S. S. "Empress of India," of Aberdeen, of the burthen of 1,369 tons, or thereabouts, and noted with him in due form of law his protest for the uses and purposes hereinafter mentioned; and now, on this day, to wit. the day of the date hereof, before me, W. K. Shope, a notary public in and for the Commonwealth of Pennsylvania, duly commissioned and sworn, residing in the city of Philadelphia, comes the said master and requires me to extend his said protest, and together with him come and appear Geo. Munroe, first mate; Wm. Reid, chief engineer; Chas. Lindroos, seaman; Anton Bartleson, seaman, all belonging to the aforesaid vessel, all of whom, being by me severally duly and solemnly sworn, voluntarily and freely depose and say that the said vessel laden with a cargo of sugar, being in every respect seaworthy and in all things fitted and provided for her intended voyage, sailed on the 23rd day of June last from Iloilo, via Port Said, bound to Philadelphia.

57 June 23rd.—Having finished loading cargo, hove up anchor and proceeded on the voyage. Nothing worthy of note happened, wind and weather being variable, and pumps, &c., carefully attended to, until—

July 1st.—When the vessel arrived at Singapore.

July 2nd.—Having taken in bunker coals, proceeded on the voyage; on—

July 6th.—A S. W. monsoon with high seas was encountered, which caused the vessel to roll and strain heavily and ship considerable water amidships. Pumps, &c., carefully attended to; on—

July 10.—The monsoon increased in violence, causing vessel to pitch and strain and ship water fore and aft. The gale continued until—

July 13th.—When the vessel came to anchor at Point de Galle. Pumps, &c., carefully attended to, but vessel making no water.

July 16th.—Having finished taking in bunker coals, proceeded to sea at 4 p. m., blowing a fresh gale from S. W. with high seas running and breaking on board, causing the vessel to roll and strain heavily. This weather continued throughout the 17th and 18th, and on—

58 July 19th.—Molasses was seen oozing through the bulkhead into the bunkers. Nothing of particular note now happened until—

July 27th.—When a fresh gale was encountered with rough beam

sea running, vessel shipping large quantities of water on deck and rolling heavily at times. Pumps, &c., carefully attended to. This weather continued until—

July 30th and 31st.—The gale increased in violence with tremendous seas running and breaking on board. Molasses still oozing into the bunkers. Towards the latter part of the 31st the weather moderated. Pumps, &c., carefully attended to, but vessel apparently making no water.

August 4th.—The vessel arrived at Aden, renewed bunkers, and proceeded on the voyage.

August 17th.—Entered the Suez canal in charge of a pilot.

August 18th.—Arrived at Port Said and properly moored vessel with port anchor ahead and two hawsers astern; made fast to the land belonging to the British admiralty.

August 21st.—Still moored at Port*h* Said awaiting orders. At 8 p. m. regulation lights burning brightly. A steamer, which afterwards proved to be the "Rheinfels," in endeavoring to enter the canal, struck the vessel abreast of the main hatch with her
59 stem and starboard bow, knocking a large hole in the vessel's side, starting the bridge and deck-houses, stanchions, badly straining the vessel, and otherwise severely damaging her. Sounded the pumps and found the vessel making some water.

August 22nd.—Surveys were held, which recommended that a portion of the cargo be discharged in order to ascertain the extent of the damage to the vessel's plating. Pumps and sluices carefully attended to.

August 23rd.—In accordance with recommendations of surveyors commenced to discharge cargo into lighters.

Sept. 3rd.—Further surveys were held, which recommended that the whole of the cargo be discharged, as it was found that the plating below the water line on the starboard side was badly damaged. Vessel making water, which did considerable damage to the cargo.

Sept. 12th.—Finished discharging cargo; it was found that about 7,000 bags of sugar had packages torn in the handling so as to require rebagging; about 910 bags of sugar were *to be* found to be damaged through stress of weather in going to Port Said, 180 of them being empty; about 500 bags were found to be damaged by water, resulting from the collision. On further surveying the vessel it was found impossible to permanently repair her at Port Said and such repairs as the resources of the port would admit were
60 recommended to be done, and the following temporary repairs were made to the plating in the top sides: Three new plates of different sizes were put in, with liners to the frames; one plate was patched; three plates that were cracked at the rivet-holes and bent were straightened and put back; four broken frames and beams were cut off and pieced, and temporary water-ways were put in and other repairs made.

Sept. 25th.—In accordance with recommendations of surveyors the vessel sailed for Alexandria in order to have her bottom sighted on dry dock, arriving there on.—

Sept. 26th.—Nothing noteworthy occurred during the run there.

Sept. 27th.—The vessel went into dry dock.

Sept. 28th—Surveys were held on the vessel; it was found that 8 plates in the bottom were bent, and in taking them out some of them were cracked at the rivet-holes and two plates were fractured. It was found impossible to replace them permanently at Alexandria, but in order that the voyage might be continued to Philadelphia the following temporary repairs were recommended and carried out: The 8 bent and cracked plates were straightened and put back; one new plate was put in in two pieces, with liners.

November 13th—Permanent and temporary repairs having
61 been completed, at 3 p. m. hove up anchor and started for Port Said, but in getting under way carried away the starboard lanyards of the fore rigging of the St'm'r "Enna." Nothing of particular note now happened, the vessel arriving at Port Said on November 14th, and commenced taking cargo.

November 30th.—Having finished reloading cargo, unmoored and proceeded on the voyage. Nothing worthy of note happened, wind and weather being variable, and pumps, &c., carefully attended to, until—

December 5th.—Which comes in with wind increasing and hauling to the E., with high seas running and breaking on board. At 4 p. m. the wind had increased to a gale, high seas still breaking on board abaft the bridge, causing vessel to roll and strain heavily, which leaked through the top sides into the bunkers and holds; at about 8 p. m. the weather moderated somewhat. From this they had fine weather, pumps, &c., being carefully attended to, but vessel making no water, until—

December 9th—At 5 p. m. the sky was overcast, with wind increasing and high cross-seas running, causing vessel to roll heavily and ship large quantities of water on board, which still leaked into the hold through the top sides.

December 10th.—Strong wind blowing from N. E. with nasty cross-sea running, causing vessel to roll and strain heavily and ship large quantities of water on deck at times. The wind
62 and sea went down towards the latter part.

Dec. 11th.—At 9.20 a. m. came to an anchor; at Gibraltar at 4.30 p. m. Surveys that were held to examine decks and covering boards recommended certain repairs, mostly of a temporary nature, which were carried out.

Dec. 17th.—Having finished making repairs and taking on board bunker coals, at 11.35 a. m. hove up anchors and proceeded to sea. Nothing worthy of note occurred, wind and weather being variable, and pumps, etc., carefully attended to, until—

Dec. 29th.—Which came in with sky overcast and lightning and high seas running, which broke on board, causing vessel to roll and strain badly. This weather continued throughout the 30th and 31st, but on—

January 1st.—The wind increased to a fresh gale, with a heavy N. E. swell running; towards the latter part it increased to a strong gale, with very high cross-sea running, causing ship to labor and strain heavily and ship large quantities of water over all; reduced

sea running, vessel shipping large quantities of water on deck and rolling heavily at times. Pumps, &c., carefully attended to. This weather continued until—

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January 1st.—The wind increased to a fresh gale, with a heavy N. E. swell running; towards the latter part it increased to a strong gale, with very high cross-sea running, causing ship to labor and strain heavily and ship large quantities of water over all; reduced

speed of vessel and put vessel's head to the sea and put oil bags over the sides.

January 2nd.—Gale continued with increased energy, and the high cross-seas that were running were still breaking on board fore and aft; caused the vessel to roll and strain heavily, staving in the cabin skylights, flooding the cabin with water, carrying
63 away the grating over after steering gear; it also carried away the after compass, with binnacle and lamps; at 10 a. m. shipped a large sea over the bows, carrying away steel hawser and reel and ventilator on forecastle deck, and broke some stanchions on forecastle head, large quantities of water entering the hold. Boards and canvass were immediately nailed over the ventilator hole and cabin skylight, the vessel still lying too with head to the wind and sea.

January 3rd.—Gale continues and high cross-seas still breaking on board and washing everything movable off the decks and causing the vessel to labor and strain very badly. Considerable water entered the engine-room through the decks and top sides, which were started by the heaving — straining. At 6 a. m. the ring bolts carried away and the anchors got adrift; they were secured as well as possible. On sounding the main ballast tank, found that the vessel was making more water than usual. The heavy strain and jerking on the wheel, drains, and steering gear while the vessel was lying to caused the deck to leak under steering gear. Towards the latter part weather more moderate. Pumps, &c., carefully attended to.

January 4th.—Weather moderated, but vessel still rolling at times and shipping large quantities of water on deck. At daylight started to pump main water-ballast tank. The water was very thick with sugar, which made the pumping very difficult, finally choking the pumps. At 5.55 p. m. sighted St. David's head-light. At 10.15 p. m. pilot came on board.

64 January 5th.—At 10.15 a. m. dropped anchor in Grassy bay, Bermuda.

January 6th.—At 9 a. m. went alongside of a coal hulk and commenced to take in coal. On sounding pumps found about 7 inches of water in the vessel and about 6 feet of water in the fore peak. The sluice was opened and the water in the fore peak ran off. It was found that the limber holes in the after hold were choked with sugar; pumped out the fore hold, but could not pump out after hold on account of limber holes being choked.

January 7th.—It was still impossible to pump out after hold, as the limber holes were still choked.

January 8th.—At 2 p. m. finished coaling; cast off from hulk; came to an anchor. Surveys were held on vessel, which reported the vessel badly stained and hogged amidships, and found that the leaks were in the top sides and deck, which had been badly strained by the heavy weather. They recommended that in order to make the vessel seaworthy to proceed to Philadelphia that she discharge sufficient cargo to increase her freeboard two feet, which will decrease the straining to a minimum, as the necessary repairs could not be made at Bermuda.

January 9th.—The master went to New York in order to make proper arrangements for transshipping cargo, &c., and to consult with parties interested. From this nothing of note happened, temporary repairs proceeding, until—

65 January 21st.—When the master returned from New York with surveyor.

January 27th.—Vessel still anchored in Grassy bay. Bark "Eliza Barss" and lighter No. 25 came alongside to receive cargo, but too much sea on to commence discharge.

January 28th.—The sea having gone down, commenced to discharge cargo into bark "Eliza Barss," lighter No. 25, and lighter Minstrel, and 7.30 p. m. wind had increased to a gale with heavy squalls and high sea running; dropped second anchor and payed out more chain on port anchor. While lighter No. 25, which had about 90 tons of sugar aboard, was being towed to Hamilton the gale of wind which was blowing and the heavy sea that was running caused her to ship large quantities of water and spring aleak, damaging her cargo and making it necessary to employ extra men to pump her and hurry discharge. During the gale, which had increased in violence, the barge "Minstrel," which was lying alongside the vessel loaded with sugar, smashed our vessle's covering board and carried away the moulding from fore rigging to forward water-closet.

January 29th.—Gale continues with heavy sea running. The "Eliza Barss" worked against the vessel's side during the night, damaging the rail; towards the latter part the weather moderated; continued discharge of cargo.

66 February 3rd.—Having discharged cargo sufficient to give the vessel two feet more freeboard, as recommended by surveyors, stopped discharge. The cargo that had been discharged was put into a warehouse at Hamilton.

February 4th.—Laborers engaged in transferring sugar from lower after hold to 'tween decks in order to get at the pumps, which were still choked; it was necessary to cut one of the pipes to make a fresh joint; they were then cleared.

February 5th.—Final surveys were held, which stated that the vessel was in a fit condition to proceed to Philadelphia.

February 6th.—Laborers came on board and transferred sugar back from 'tween deck to lower after hold. At 3.50 p. m. hove up anchor and proceeded on the voyage.

February 7th.—They had a strong breeze and heavy swell, which caused the vessel to roll heavily.

February 8th.—Towards the latter part the wind increased to a gale with a nasty beam sea running, which caused the vessel to roll heavily and strain very much and ship large quanties of water on deck; at 8.30 p. m. brought ship's head to the sea.

February 9th.—Gale continues, vessel still rolling heavily and shipping large quantities of water on deck. At 3.20 a. m. still rolling heavily, but wind and sea moderating; during the night

67 the bowsprit carried away with top-gallant stay and gear attached; 2 p. m. crew securing gear between deck, it having

broken adrift during the gale; it was found that the straining had started the decks and vessel was again leaking through them; pumps, etc., carefully attended to.

February 10th.—Comes in with fine weather; at 12.25 p. m. took pilot on board; at 3 p. m. passed in Delaware breakwater.

February 11th.—At 3.35 p. m. came to an anchor off Philadelphia; pumps and sluices carefully attended to throughout the voyage. From this day until—

February 20th.—Vessel was lying at anchor awaiting completion of arrangements for security for general-average charges, etc., when they commenced to discharge cargo. The cargo left at Hamilton was forwarded to destination by steamer "Trinidad."

And the said deponents on their oaths declare that the said vessel was at the commencement of the voyage aforesaid tight, staunch and strong, well manned, vitualed and equipped, and had her cargo well and sufficiently stowed and her hatches properly closed and secured, and that during the said voyage they, together with the rest of the crew on board, used their utmost endeavors to preserve the said vessel and her cargo, tackle, and apparel from damage or injury, and that any loss, damage, or injury which has arisen or accrued, or that may arise or be sustained in any way or
68 manner whatever, is solely owing to the accidents and difficulties herein set forth and declared and not to any negligence, want of skill, vigilance, or exertion on the part of the deponents or any of the officers or crew of the said vessel.

| | | |
|---|---|---|
| Master, | JOHN DEWAR. | (Signed.) |
| 1st Mate, | GEO. MUNROE. | " |
| Seamen, | WM. REID. | " |
| | ANTON his x mark. BARTLESON. | " |
| | CHAS. LINDROOS. | " |

Witness to mark of Anton Bartleson:
(Signed) W. R. COE.

Whereof the said John Dewar, master and commander as aforesaid, hath requested me to protest, and I, the said notary, at such his request, have protested, and by these presents do publicly and solemnly protest, against all and every person and persons whom it doth, shall, or may concern, and against all and singular the accidents, casualties, and circumstances already set forth in the foregoing declaration on oath for all manner of losses, costs, damages, charges, expenses, and injuries whatsoever which the said vessel and her cargo on board and the freight by her earned or to be earned or either of them or any part thereof have already sustained or may hereafter sustain by reason or means of the foregoing premises.

Thus done and protested in the city of Philadelphia this 14th day of March, in the year of our Lord one thousand eight hundred and ninety.

In testimony whereof I have hereunto set my hand and affixed my notarial seal.

(Signed) W. K. SHOPE,
*Notary Public.*

69 STATE OF PENNSYLVANIA, }
*City of Philadelphia,* } ss:

I, W. K. Shope, of the city of Philadelphia, a public notary in and for said city, duly commissioned and sworn, do certify the foregoing to be a true and exact copy of an original protest made before me.

In testimony whereof I have hereunto set my hand and notarial seal this fifteenth day of March, one thousand eight hundred and ninety.

[SEAL.] W. K. SHOPE,
*Notary Public.*

70 And closed their case.

Defendants' counsel then offered in evidence and read letter written by Mr. Lueder to the defendants dated September 17, 1889:

NEW YORK, 17*th Sept.*, 1889.

Mess. Harrison, Frazier & Co., Philadelphia.

DEAR SIRS: I am in receipt of your favor of yesterday. Messrs. A. T. & Co., under date 7th inst., report as follows in reference to the S. S. Empress of India: All the cargo has been discharged, and upon a further survey of the steamer she was found to have experienced more serious damage than was first anticipated. She will likely have to go to a dry dock to undergo the necessary repairs and quite a delay may be caused thereby, which, however, cannot be avoided. It occurs to me that it might suit you to have the sugar come forward by some other steamer, if such arrangements could be made and if the reshipment of the sugar would be expedited thereby. Will you be so kind as to give me your views on the subject? You will understand that my friends cannot take any steps whatsoever in this direction without your full consent and with the distinct understanding that the reshipment by another steamer must in no way interfere with our contract nor any of its conditions save the "non-arrival" clause. It is useless for me to make any suggestions to my London friends before I have your authority in the matter.

71 I regret that my offer on S'day of the China sugars did not lead to any business. Today my friends cabled that with a firm bid of $\frac{3}{8}$c. they could probably buy the lot and ship it to Phila. by a st'r advertised to sail on the 28th inst. I requested Mr. Newhall to wire you this information and request you to give the matter your consideration. Javas first No. 8 in color could be bo't on the other side to the extent of ab't 300 tons at $6\frac{1}{4}$ basis, 93; probably at $\frac{1}{16}$—$\frac{1}{8}$ less. Do they interest you, or Peruvian concrete, basis 84, at $\frac{3}{8}$, perhaps $\frac{5}{16}$, say about 250 tons? October beet I was tendered firm for this port, $\frac{15}{9}$ cof. Will you make

me that bid for a steamer cargo (2 a. three thousand tons) to Philadelphia? I would even cable $1\frac{5}{6}$.

The European markets are steady.

Very truly yours, A. LUEDER.

72 Counsel for defendants read the following stipulation in evidence:

"It is agreed as a fact proved in the cause, subject to the objection for irrelevancy, that the defendants at the time of making the contract sued on were refiners of raw sugar, which fact was known to the plaintiffs, and purchased the sugar in the declaration mentioned for use in their said business, and the plaintiffs supposed this to be the fact.

"Also subject to the like objection that the usual time for a voyage of a steamer of the size and class of the 'Empress of India' from Phil*l*ip-ine islands to Philadelphia is about three months unless prolonged by accident or sea perils."

Defendants' counsel offered in evidence bills of lading and documents and entry of the vessel at the custom-house.

73 The bills of lading state that the sugars are shipped by Smith, Bell & Company, of Iloilo, in the steamship "Empress of India," for orders to New York, Boston, or Philadelphia or to any safe port in the United States, deliverable to order. One is dated June 17th and the other June 22nd, 1889.

They are endorsed by Smith, Bell & Company, delivered to Lueder or order, endorsed to John Craig & Company.

The entries are that they are imported by John F. Craig & Company, in the "Empress of India," from Iloilo, March 6th.

And then called WILLIAM W. FRAZIER, who, having been duly sworn, said:

Q. You are a member of the firm of Harrison, Frazier & Company, the defendants in this case?

A. Yes, sir.

Q. You have been engaged in the business of sugar refining for how many years?

A. Over twenty-five years.

Q. In connection with it you have dealt largely in sugars in New York and Philadelphia, have you not?

A. Yes, sir.

Q. Purchasing a great many cargoes?

A. Yes, sir.

Q. And have become familiar with the words used ordinarily in your trade, I suppose?

A. Yes, sir.

74 Q. Tell us what the meaning of "*ex* ship" is.

A. "*Ex* ship" is receiving goods from the tackle of the ship that brings them to the purchaser.

Q. Has it any other meaning beyond what you have given?

A. None that I know of.

Q. Have you ever heard in the trade any other meaning given to it than that which you have stated?
A. No, sir.

Cross-examination:

Q. You make contracts, I suppose, for your own business?
A. Yes, sir.
Q. You never have acted as broker or middleman for anybody else, have you?
A. No, sir.
Q. So that whatever knowledge you have got on this subject is derived from what you gained in the course of your own trade?
A. Yes, sir.
Q. How much sugar a day do you use in your refinery?
A. About a thousand tons.
Q. Year in and year out?
A. On an average.
Q. You make purchases with reference to the wants of your refinery as they continually exist, do you not?
A. Yes, sir.
Q. Do you confine your purchases to Philadelphia or do you sometimes buy in New York?
75 A. We buy in New York as well as in Philadelphia.
Q. Anywhere else?
A. Yes, sir.
Q. Where else?
A. We buy in Boston, in London, Hamburg, and through the West and East Indies.
Q. Are you personally concerned in making the contracts?
A. That is not my branch of the business; no, sir.
Q. Who attends to that?
A. Mr. Charles Harrison.
Q. Practically you do not have to do with making these contracts of purchase?
A. I very frequently have.
Q. How often have you as compared with Mr. Charles Harrison?
A. He has very much more experience as to the detail than I have.
Q. Who made this contract with Mr. Lueder?
A. I cannot remember which member of the firm. I was cognizant of it before and after it was made.
Q. But you have no recollection of taking any part in it yourself?
A. In the consultation preparatory to making the contract; yes, sir.
Q. But in the making of the contract who on behalf of your firm acted in that particular transaction?
A. Either Mr. Charles Harrison or our agent in New York.
76 Q. You did not have anything to do with it?
A. No, sir.

Re-examined:

Q. You were asked whether you bought as a middleman or for yourself and you said for yourself only. Have your dealings been with one person or with pretty much the whole trade?

A. The whole trade.

The COURT: I do not know whether this witness is understood to have stated the technical or trade meaning of this term otherwise in effect than it was stated by the witnesses of the plaintiffs. He says *ex* ship means receiving the goods from the tackle of the ship.

Mr. JOHNSON: We concede that. I wanted to exclude the idea that there was any other trade meaning in it. They undertook to prove it might mean by that or another ship.

The COURT: The description of the meaning of this term is not in controversy between the two witnesses.

Mr. JOHNSON: Not at all. They say it goes beyond that and we say it does not.

Q. The meaning of the term "*ex* ship" fixes the time when the responsibility of the seller ends and the responsibility of the buyer begins?

A. Yes, sir; the charges and responsibilities.

Q. All charges are paid by the purchaser after the goods leave the ship?

77 A. Yes, sir.

Q. The property changes hands and the purchaser becomes responsible for all charges; is that the fact?

A. Yes, sir.

Defendants then closed their case.

The plaintiffs then recalled AUGUST LUEDER, who said:

Q. Where were you when you wrote your letter to Harrison, Frazier & Company on September 17th, of which Mr. McMurtrie has offered a part in evidence?

A. I was in New York.

Q. In that you refer to a communication which you have received from Messrs. A. Tessdorpf & Company under date of 7th of September. That letter from them was written where?

A. In London.

Q. When you wrote to Messrs. Harrison, Frazier & Company where did you understand the "Empress of India" to be and what to be her situation?

A. I understood the vessel to be discharging her cargo at Port Said, on the Suez canal, to make repairs. To what extent we did not know, but it looked to me as if it might take considerable time.

Q. She was to make repairs with what view?

A. To make repairs to take in the cargo.

Q. The suggestion which you made to Messrs. Harrison, Frazier & Company in your letter of September 17th was with what view?

78 A. From the information I had it looked to me as if it might be a pretty long job, as is generally the case in repairs of steamers, and so on, and the market was all the time declining, and I thought it might be advisable for Harrison, Frazier & Company to hurry on that sugar. That was my object.

Q. To hurry up the voyage?

A. To hurry up the voyage; if they had consented to it, which would have been necessary, because then it would have been a voluntary change from the original contract.

Q. If the sugars had come forward then it would have been a voluntary change on your part?

A. On the sellers' part.

Q. The ship was then proposing to complete her repairs and bring on the sugars herself?

A. Yes, sir.

This closed the testimony.

After argument by both parties, plaintiffs' counsel, upon the following points, moved — court to direct a verdict in favor of the pl'ffs.

*Plaintiffs' Points.*

79 "The plaintiffs ask the court to direct a verdict in their favor."

"1. The contract of June 22, 1889, for the sale of 'about 2,500 tons of superior Iloilo sugars' by plaintiffs to defendants was an executory contract binding on the parties according to its terms."

"2. The stipulation of the contract as to the price of the sugar, '5⅝ cents per pound *ex* ship, net landed weights, two per cent. tare cash, less two and one-third per cent., in ten days from average date of discharge,' meant, in legal contemplation and according to the meaning in commercial use of the term '*ex* ship,' that in respect to the contract price all charges of freight and duties and discharge from the ship were to be borne by the plaintiffs, and that the defendants should be under no responsibility as to any charges on the sugars until they were landed on the dock at Philadelphia."

"3. By the terms of the contract the plaintiffs were required to ship, during the month of June, 1889, from the Philippines to Philadelphia, the entire quan-ity of sugar stipulated in the contract of the assorted grades therein specified. Such shipment was required by the contract to be per steamer 'Empress of India,' with a proviso in the contract that should said steamer be unable to load by reasons of certain specified causes the sugars within the time specified and the sellers could not secure other steam tonnage to load in June, the contract should be void. The legal effect of this stipulation as to time of shipment and vessel by which the shipment was to be made was to require the plaintiffs to com-

80 plete the shipment during June, 1889, on the 'Empress of India,' if she was able to load, and if unable by reason of any of the causes specified in the contract, then the plaintiffs were bound to secure other steam tonnage, and if unable, the contract was at

an end. This provision of the contract looking to inability of the 'Empress of India' to load, did not limit the plaintiffs to the selection of a single steamer as a substitute for the 'Empress of India;' they were at liberty to employ any available 'steam tonnage.'"

"4. It is undisputed that the plaintiffs fully performed the requir-ment of the contract by shipping from the Philippines during June, 1889, for Philadelphia, on the 'Empress of India,' the stipulated quan-ity of sugar of the quality and assortment called for by the contract; also that the steamer was staunch, seaworthy, and in all respects well and sufficiently equipped for her voyage."

"5. The stipulation in the contract in reference to sea damage, for which if it occurred fair allowance was to be made, was in contemplation of the risks and perils of the sea voyage, in respect to which both parties to the contract stood on equal footing, and the contract contained no warranty or provision in respect to the voyage or any incident of that voyage except that in case of sea damage fair allowance should be made."

"6. Time was not of the essence of the contract, except as to the shipment in June, 1889, and there was nothing in the contract binding the plaintiffs in the absence of any act of their own causing unreasonable delay in the transportation of the sugar to Philadelphia after its shipment in June, 1889, to any obligation as to time of delivery in Philadelphia."

81 "7. No such obligations can be imported into the contract from any fact proved in evidence. The fact that the time of shipment was stipulated in the contract does not create any obligation as to the time of delivery, but, on the contrary, the absence of any stipulation as to the time of delivery creates the presumption that no obligation as to the time of delivery, so long as no fault was committed by plaintiffs, entered into the contract."

"8. The carrying vessel having been designated by the contracting parties, the master of the vessel was charged with the duty of her navigation and management and the proper care of the cargo of sugar. The 'Empress of India' was not owned by the plaintiffs nor by the defendants, but was the designated carrying vessel, and it is undisputed that the disasters and delays in the course of the voyage from the Philippines to Philadelphia *was* not due to any fault of the plaintiffs or of the master, but were due to sea perils and damage."

"9. This being the case, the delay in the voyage constitutes no ground of refusal on the part of the defendant- to accept the sugars and no defence in this action. If the 'Empress of India' had arrived with all the sugar on board, less the sea damages, the delay owing to the causes proved would have not entitled the defendants to refuse to accept the sugars and pay the contract price."

"10. The breaking of bulk by the 'Empress of India' owing to sea perils and damage and the temporary storage and final transferment of a portion of the cargo by the 'Trinidad' was an incident of the voyage, and being in good faith does not constitute a failure of performance of the contract by plaintiffs, inas-

82 much as there was no warranty or condition that the sugar

was to arrive per the 'Empress of India,' but only that it was to be shipped on that vessel if able to load in June. The contract was for sale and delivery of the stipulated quan-ity of grades of sugar, and so long as without fault of the plaintiffs a temporary separation of the packages occurred during the transportation this did not relieve the plaintiffs from the duty of delivery or the defendants from the obligation of accepting the sugar on its arrival in Philadelphia; and if defendants' contention is correct that shipment per the 'Empress of India' required carriage by the 'Empress of India,' and also arrival of the Empress of India at Philadelphia, then the clause of the contract as to substituted tonnage applies and plaintiffs were at liberty in case of need to substitute other tonnage."

"11. While in contracts for sale of merchandise to be delivered at a distant point, where nothing is stipulated as to time of delivery, the law will imply that it is intended that such delivery must be made within a reasonable time, this rule relates to those things which must be done by the seller in the due execution of his contract, and not all to things beyond his control and as to which he never contracted."

"12. The transaction here was made in the regular course of the business of the defendants, sugar refiners using one thousand — of sugar daily, and buying in the chief markets of the world for consumption in their refinery, and not in reference to any special need or circumstance. The subject of sale and purchase was beyond the China seas, in the Philippines, and the plaintiffs would have been reckless indeed of they had stipulated for any time of arrival. The time of shipment was in their control, and that they stipulated for. Beyond this they were not bound."

83 "13. The suggestions made by plaintiffs' agent, Mr. Lueder, in his letter of September 17, 1889, when the 'Empress of India' was at Port Said, of a transhipment to hurry the voyage is wholly without relevancy as to any issue in this action. It was a suggestion of a new and voluntary arrangement of which nothing came, of course; no change could then have been made except by mutual consent. The steamer was in a place where she could repair, and where she proposed to repair and complete her voyage."

"14. The storing of a part of the sugar at Hamilton, Bermuda, and the sending it forward by the 'Trinidad' was an involuntary act compelled by the perils of the sea and the distress of the vessel, and plaintiffs were in nowise responsible therefor, as their protest showed, but such protest did not in anywise effect or alter their rights or relations under the contract of June 22, 1889, with the defendants."

"15. The entire shipment of about twenty-five hundred tons of sugar shipped by the plaintiffs at the Philippines under and pursuant to the contract of June 22, 1889, having been tendered to the defendants in due form and after rejection by them having been sold at a loss, the defendants are bound to pay the difference between the contract price and the price realized, with interest from

March 10, 1890 (ten days after average date of discharge, February 28), and the plaintiffs are therefore entitled to a verdict for the ascertained amount, $63,098.08, with interest in the further sum of $2,786.83, amounting in all to $65,884.91."

84 *Charge of the Court.*

BUTLER, *J.*:

GENTLEMEN OF THE JURY: From the view I take of the disposition that must be made of this case it does not appear to me to be necessary that I should go over these points and answer them seriatim.

In the disposition of questions that arise in the trial of causes before juries, questions must be disposed of upon the impressions that the court has, not upon a deliberate judgment such as may be formed where there is time for examination and deliberation, as where cases arise in what is termed the argument court.

I might, upon a point for the defendant, reserve this question, but I do not know that there would be any advantage in doing so. I have no desire whatever to express the reasons for the views I entertain, either in writing or orally. As the matter stands, I think it is better that I should dispose of it at once on the impressions I have, allowing the case to go up for review, as it necessarily, I suppose, will.

Without occupying time to state my reasons for the judgment, I am of opinion that the plaintiffs complied with all the requirements of their contract, and it is not necessary to say more on the subject. It would take some little time to state my reason for such opinion. I think they were required by the written contract to do no more than they did. I say this with some hesitation. The questions discussed are very nice, as those arising out of com-
85 mercial contracts, where there is room for controversy, almost always are.

It is sufficient to say that my present impressions are that the plaintiffs were required by their contract to do no more than they did, and it is sufficient to say to the jury that there is no controversy here about the facts; the sugar contracted for was brought to this port and was tendered to the defendants, who declined to receive it for the reasons stated in your presence.

In the judgment of the court they were not warranted in declining to receive it, and by declining they made themselves liable to this suit, and the plaintiffs are entitled to recover the amount of the claim presented.

Defendants' counsel except to the ruling of the learned court.

The jury rendered a verdict in favor of the plaintiffs for $65,884.91, including interest to date.

86 And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 19th day of December, A. D. 1890.

WM. BUTLER. [L. S.]

The within bill of exceptions is approved as to form.

BUTLER, STILLMAN & HUBBARD,
*For Pl'ffs.*

[Endorsed:] 31. Ap'l, 1890. Fortlage *v.* Harrison. Bill of exceptions. Copy. (S'g'd) W. B.

87 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

HERMAN FORTLAGE, AUGUST MÖLLMANN, and Robert Mestern, Trading as A. Tesdorpf & Co.,
*vs.*
CHARLES C. HARRISON, WM. W. FRAZIER, Alfred C. Harrison, Wm. W. *Frazier*, and M. Harrison, Trading as Harrison, Frazier & Co.

No. 31.
April Sess., 1890.

Know all men by these presents that we, Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison, and Mitchell Harrison, trading as Harrison, Frazier & Co., the defendants above named, and H. H. Houston, as surety, are held and firmly bound unto Herman Fortlage, August Möllmann, and Robert Mestern, trading as A. Tesdorpf & Co., the plaintiffs above named, in the full and just sum of one hundred thousand dollars, to be paid to the said Herman Fortlage, August Möllmann, and Robert Mestern, trading as A. Tesdorpf & Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirty-first day of December, A. D. 1890.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between Herman Fortlage *et al.*, trading as A. Tesdorpf, plaintiffs, and Charles C. Harrison *et al.*, trading as Harrison, Frazier & Co., defendants, judgment was rendered against the said defendants, and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiffs, citing and admonish-

88 ing them to be and appear at a Supreme Court of the United

States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William H. Harrison, and Mitchell ——, trading as aforesaid, shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAS. C. HARRISON. [SEAL.]
W. W. FRAZIER. [SEAL.]
ALFRED C. HARRISON. [SEAL.]
W. W. HARRISON. [SEAL.]
MITCHELL HARRISON. [SEAL.]
H. H. HOUSTON. [SEAL.]

Sealed and delivered in presence of—
JOS. W. ROBINSON.
FRED. W. PRICE.
A. B. RONEY, as to H. H. H.

Sureties approved.
WM. BUTLER, *Judge.*

[Endorsed:] No. 31. April sess., 1890. Circuit court United States. Fortlage *vs.* Harrison. Bond surwrit of error. Filed Jan. 2, 1891.

89 UNITED STATES OF AMERICA, } *sct:*
*Eastern District of Pennsylvania,* }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Herman Fortlage *et al. vs.* Charles C. Harrison *et al.*, No. 31, April session, 1890, on file and now remaining among the records of the said court in my office.

Seal U. S. Circuit Court, E. D. Pennsylvania.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

SAMUEL BELL,
*Clerk of C. C.*

Endorsed on cover: Case No. 14,454. E. Pennsylvania C. C. U. S. No. 370. Charles C. Harrison, William M. Frazier, Alfred C. Harrison, William W. Harrison, & Mitchell Harrison, copartners trading under the firm name of Harrison, Frazier & Co., plaintiffs in error, *vs.* Hermann Fortlage, August Mollmann, and Robert Mestern, partners under the firm name of A. Tesdorpf & Co. Filed January 14, 1891.

Office Supreme Court U. S.
FILED
NOV 6 1894
JAMES H. McKENNEY,
Clerk.

No. 76. Of October Term, 1894.

# Supreme Court of the United States.

(*Record No. 14,454.*)

Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison and Mitchell Harrison, Copartners, trading under the firm name of Harrison, Frazier & Co., Plaintiffs in Error,

*vs.*

Hermann Fortlage, August Mollmann and Robert Mestern, Partners, under the firm name of A. Tesdorpf & Co., Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

## BRIEF FOR PLAINTIFFS IN ERROR.

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JOHN G. JOHNSON,
*Attorney for Plaintiffs in Error.*

Allen, Lane & Scott, Prs., Phila.

# In the Supreme Court of the United States.

October Term, 1894. No. 76. (Record No. 14,454.)

*Charles C. Harrison, William W. Frazier, Alfred C. Harrison, William W. Harrison and Mitchell Harrison, copartners, trading under the firm name of Harrison, Frazier & Co., Plaintiffs in Error,*

vs.

*Hermann Fortlage, August Mollmann and Robert Mestern, partners, under the firm name of A. Tesdorpf & Co., Defendants in Error.*

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

## *BRIEF FOR PLAINTIFFS IN ERROR.*

## I. STATEMENT OF FACTS.

The plaintiffs below were merchants, the defendants (plaintiffs in error) were sugar refiners, who bought this sugar to refine.

The contract was as follows:—

New York, 22nd. June 1889.

*Messrs. Harrison, Frazier & Co., Philadelphia.*

Dear Sirs:—I have this day sold you for % of Messrs. A. Tesdorpf & Co. of London, about *2500 tons Superior Iloilo Sugars,* usual assortment

(⅛ No. 1, ¼ No. 2 and ⅝ No. 3) shipping or to be shipped during *this month* from the Philippines to Philadelphia, per steamer "*Empress of India*," at 5⅝c. per lb. ex ship, net landed weights, 2% tare, cash less 2½% in 10 days from average date of discharge.

Sea damage, if any, to be taken at a fair allowance. No arrival no sale.

Should the steamer through any unforeseen circumstances, such as accidents of the Seas, stress of weather, &c., be unable to load these sugars within the time specified, and the sellers cannot secure other steam tonnage to load in June this contract is to be void.

Yours truly,

G. G. BAUER,
*Per* A. LEUDER.

This was accepted.

The sugar was shipped in due time on the "Empress of India." An accident compelled the master to unload and store the cargo, go to Alexandria for repairs, return and reship the sugar. When crossing the Atlantic the vessel was found incapable of doing so. The ship put into Bermuda and unloaded about seven hundred tons to make her competent to reach Philadelphia. The master came to New York and arranged to have the seven hundred tons brought from Bermuda to Philadelphia by another ship. The "Empress" arrived with a part of the cargo. The "Trinidad" came with the rest. The two were tendered by the sellers to the purchasers, and they refusing to accept, the cargoes were sold, and this action brought for the difference between the contract price and the market value at the time of tender. The arrival was in February and March. The usual time would have been early in September.

The only question raised was whether this was a good delivery under the contract; that is, were the defendants obliged to take and pay for this sugar under that contract.

It was proved that the sellers admitted that they could not lawfully transship the sugar, neither because of the accident in the Red Sea, nor because the "Empress of India" had become unable to complete the voyage. And they proved that they had protested against the proposed transshipment by the captain.

## II. ASSIGNMENTS OF ERROR.

1. The learned judge erred in charging the jury, as follows :—

It is sufficient to say that my present impressions are that the plaintiffs were required by their contract to do no more than they did, and it is sufficient to say to the jury that there is no controversy here about the facts; the sugar contracted for was brought to this port, and was tendered to the defendants, who declined to receive it for the reasons stated in your presence.

In the judgment of the court they were not warranted in declining to receive it, and by declining they made themselves liable to this suit, and the plaintiffs are entitled to recover the amount of the claim presented.

2. The learned judge erred in directing the jury to render a verdict for the plaintiff.

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## III. ARGUMENT.

The judge told the jury that the plaintiffs had performed their contract, and the defendants were bound to accept and pay. The facts being undisputed, the correctness of this ruling depends entirely on the meaning of the contract. The defendants contended it was conditional, and the condition was not performed—that the condition was that the sugar, if loaded according to the contract, should arrive on that ship. If this is not correct, the direction was right. If arrival by the "Empress of India" was a condition precedent to the duty of the purchasers to accept, it was wrong.

To avoid the defendants' contention that the contract was conditional on the arrival of the sugar by the particular ship, it was contended: 1. That the mode of carrying was no part of the contract. That no particular mode of transportation had been stipulated for. 2. That there were but two conditions—one as to the loading, the other that the sugar arrived. 3. That the transshipment by the "Empress of India" by the master because of necessity made the delivery by the substituted vessel become a delivery by the "Empress of India."

It is clear and plain if arrival of the sugar was the only

condition precedent, all questions as to the effect of the transshipment are irrelevant, because immaterial. It may be that if the arrival by the "Empress" was a condition precedent, a substituted ship may be equivalent, and an arrival by her deemed an arrival by the "Empress." This will be discussed further on.

I. THE FIRST POINT IS, THEREFORE, WAS AN ARRIVAL BY THE "EMPRESS OF INDIA" A CONDITION PRECEDENT?

That it is, and that the words are not words of contract, but of condition, seems settled by the remark of Parke, B., Johnson *vs.* Macdonald, 9 M. & W., 603, and the decision there. That is, no obligation is assumed by the seller that the goods shall be carried at all, much less that they shall be carried by a particular ship. But he is not to be bound to deliver or the purchaser to accept unless the goods reach Philadelphia in that ship. The contract was not a sale—it was a contract to sell, which became a sale only on performance of the conditions precedent, whatever they were, among which it was admitted loading within time was one, and arrival of the sugar at Philadelphia was another. That is, until and unless the goods arrived there was no sale, no duty to tender, no duty to accept, no title had passed, no ownership existed in the purchaser. This was admitted below, and probably will be in this court. The authorities are numerous, and will be found collected in 7 Vroom, 154, Neldon *vs.* Smith. It is a contract to sell the goods when they arrive. Stockdale *vs.* Dunlap, 6 M. & W., 233, Parke, B. The best test, however, is that the purchasers have no insurable interest in the property. Probably as this was admitted in the argument it will be so here.

Before referring to the authorities as to the meaning of the words in this contract importing a condition precedent, *no arrival, no sale*, it is not without great weight that we can point to the admissions of the sellers that by their contract they could not compel acceptance of the cargo by any other vessel than the "Empress." They were London merchants. They doubtless had taken advice there, and they admitted

that even to avoid the expenses of delay—waiting for repair of the ship—(the interest on the cost of the cargo)—or even to make it possible for the sugar to reach Philadelphia, because of the unseaworthiness of the ship they could not transship. We do not claim anything like an estoppel to dispute the correctness of these admissions, but we do insist that they came from the same source as our authorities—London lawyers.

In contending that *arrival*, which is a condition precedent to the sale, extends to ship as well as cargo, *i. e.*, means arrival of cargo by that ship, we submit the following considerations looking to the contract alone for the reasons:—

It is a precedent condition in all contracts of sale that there is a subject of sale. Benj., section 669.

The sale here is made to depend on arrival—*no arrival, no sale.* Therefore, till there is an arrival there can be no subject of sale.

It might be supposed to be, if the words are not carefully weighed, a condition avoiding the sale, but it is not, for no title is to pass till arrival, and that is the test, whether the transaction is a sale or a contract to sell. That the sugar did not, till arrival, become the subject of a sale is shown by Bowes *vs.* Shand, 2 Appeal, 468, 475, and accords with plaintiffs' own views as shown by their evidence.

The property that is contracted to be sold, and that was to be the thing sold, on the happening of the future event (arrival), is the thing described in the contract—sugar—and among the terms there is this one: that it is to be *shipped to Philadelphia per "Empress of India."*

The dispute is as to the meaning of the contract.

And the contract being a sale to take place at a future day of a thing described in part by the words *shipped*, &c., what the parties say is, we agree that the thing to be sold is a thing that has been or will be shipped to Philadelphia per "Empress of India." This being so, do they not mean that that description is to be applied to ascertain whether the contract is fulfilled, which stipulates as the condition that if there is no arrival there is to be no sale, and therefore do they not intend

that the word *arrival* extends to the vessel by which it was agreed the sugar would be shipped, as well as to the sugars themselves?

It is of no consequence that shipped to Philadelphia *per* "Empress of India" may mean put on board for carriage and no more.

This would be its meaning in a contract that made such a shipment a delivery, so that the cargo was then at the purchaser's risks.

But a contract to sell all cargoes shipped during the year to P. from A. *per* "Empress of India," on their arrival, means just the reverse. This defines the thing by reference to the particular vessel—it is its cargo, and not the cargo shipped by it, but the cargo that arrived by it. That defines it, by the place and manner of delivery.

Therefore, arrival in this contract includes not merely sugar, but that sugar which is described in the contract; and one of the terms of that description is sugar shipped *per* "Empress of India" to Philadelphia.

In considering intention of the parties the effect of an attributed intention is important. L. R. (1893), 2 Q. B., 281. In this case, though the purchasers stipulated for the loading on the particular vessel, and for shipment *per* that vessel to Philadelphia, and this was to be a steamer, the sellers maintain they did not mean that it was to be so carried, but that any mode of carriage might be selected by the seller.

This absurd result is the consequence inevitable of holding arrival was confined to cargo, and the mode or vehicle was not included.

This is the very reverse of the rule of construction applied by Lord Ellenborough in Idle *vs.* Thornton, 3 Camp., 274, which was that the parties contemplated a cargo that would arrive in the ordinary course by the vessel named.

This explains in part the uniform rule of the cases that *arrival* extends to both vessel and cargo, where there is a named vessel.

The other construction exhausts the words describing the ship and the voyage by a loading on a vessel bound to Phila-

delphia, and removes from them any effect of implying that there is also to be a carrying by that vessel—thus including all obligation for steam transportation.

Which of these two is the more natural meaning to attribute to merchants?

On the other hand, consider the absolute want of meaning in every word in the contract descriptive of the subject of the purchase if arrival by that particular steamer is not a condition precedent to the sale. If the particular quantity of sugar then at Iloilo was to be sold *if it arrived in Philadelphia*, no matter how, and irrespective of the arrival of the steamer, of what possible use or for what possible purpose was it stipulated that it must be shipped on that vessel for Philadelphia within a certain time. And why stipulate for a shipment in the alternative being by a steamer if a carriage in the vessel in which the sugar should be shipped and arrival by that ship is to form no part of the contract? Yet it is settled by an authority that none will dispute, that loading in that ship at that place within the time stipulated are all and each absolutely conditions precedent to any sale under this contract. Bowes *vs.* Shand, 2 Appeal Ca., 455. And while this is admitted (it was so at the trial), we are told that merchants, after making all these stipulations in reference to the loading of the cargo, do not mean, cannot be supposed to intend to stipulate for a carriage by that vessel when they add if there is no arrival there is to be no sale. Surely it lies on those who insist on this meaning to give a reason for the use of words that impose at least three conditions that, on their theory, are to have no possible bearing on the effect of the contract, and certainly serve no useful purpose.

But these are by no means the only reason for this construction.

It may not be amiss to point out a consequence of reading the contract as it was asked to be read, viz., that arrival of the sugar was the one only condition precedent and that the mode of arriving was immaterial. It will follow that one of the most important rights of a shipper is lost by the plaintiff and given to no one. This is the right of electing to permit the

goods to be forwarded or to accept them at the port of distress. The shipper always has such a right; if he declines exercising it, the master may, by forwarding, impose a very heavy burden on his goods.

If, therefore, he has undertaken to deliver in the event of the arrival of the goods, regardless of the ship, he cannot avoid the duty because the burden becomes too great. Intentionally to divert the goods would be a fraud on the contract, if his object was to avoid his obligation to deliver. 2 Camp., 327 (note), Hawes *vs.* Humble. If arrival by the ship is the condition, he is discharged altogether by the misfortune to that ship. Idle *vs.* Thornton, 3 Camp., 274..

It is this that is the basis of the decision of the Court of Exchequer in Lovatt *vs.* Hamilon, 5 M. & W., 639, which the judge at the trial distinctly refused to follow. He would not see that if the arrival by the ship is not part of the condition, the seller will be subjected to very different responsibilities than if the contract is to deliver on the arrival of the goods only. Hale *vs.* Rawson, 4 C. B., N. S., 85, is an illustration of the effect of confining the condition to the arrival of the ship only. The obligation to deliver the goods was held to be absolute though there were none on board, and here it would be absolute, though the sellers were not the owners on the arrival in Philadelphia, and by no fault of theirs. The absurdity of such a contract would almost warrant a court in disregarding a literal meaning. What then is the meaning of the words of this contract; do they indicate a double condition precedent; does the arrival mean of the cargo, or of the goods only, by whatever mode of transit they do arrive?

The consequences to the purchasers ought to be noticed if our contention is rejected. Nothing can be clearer than that the only thing in the contract bearing on the duty to carry at all arises by implication; it is implied that there had been a charter got for the "Empress," and if there is to be a substitute, it is to be a steamer, and time is made of the essence because the loading must be completed in June. Both parties contemplated a carriage by steam, starting not later than July 1st.

Strike out of the condition *arrival by that vessel*, and the consequence is the seller or the carrier may substitute any possible mode of conveyance they please; the purpose of stipulating for a steamer is lost.

It is impossible to say that unless there is a condition to arrive by that vessel, that the seller could not for any reason whatever transship to a sailing ship. Consider his own proposition but for a moment. No particular mode of carriage is stipulated for. If so, what is there to interfere with as many changes in the mode of carrying as suits the seller. Why then was he advised that he could not transship? Although (as was said in Bowes *vs.* Shand, 2 Appeal, 463–5–8, 745–6–9–80, recognized by this court, 121 U. S., 255–263), it is unnecessary to inquire why the contract was made as it was, nobody has a right to modify it (Coddington *vs.* Paleologo, L. R., 2 Exch., 197) or substitute any other mode of performance; but it is not amiss to consider the reasons for letting it operate as it is written.

It being admitted that arrival of some kind is a condition precedent, the first inquiry is, does this contract belong to the class known as *contracts to arrive*. There is such a class, and it has rules of interpretation of its own, just as contracts for sale on trial, contracts for sale or return, &c., which are so well known as to be classified under these heads in Mr. Benjamin's Treatise on Sales. (Benj., section 595, and the index.) Nor can it well be disputed that this does belong to the class of sales to arrive. The thing sold is made to depend for its becoming the subject of a sale on the definition of the thing, by the place of production, the quantity, the ship on which, the place at which, the time in which, and the place to which, it is to be shipped. (Bowes *vs.* Shand, 2 Appeal, 474, 480.) What would have resulted if there had been nothing more said need not be discussed. Whether the stipulation as to payment imported any condition as to passing of title, or the stipulation for allowance for sea damage, which is inconsistent with the passing of the title to the purchaser, need not be discussed.

But it is very much to the purpose to point out that Mr.

Benjamin says (section 586) to arrive *per* ship A., or *ex* ship A., are identical phrases for this purpose, and we find the phrase "*ex* ship" in this contract, and also "*per* 'Empress of India.'" These were got rid of at the trial by saying as to *ex* it only imported the time for the transfer of the title, and as to the *per* steamer "Empress of India," by passing it over in silence. If to arrive *ex* ship "A." imports the condition of the arrival of the ship, it seems difficult to say that a sale conditional on arrival, the cargo to be shipped *per* "A." and delivered *ex* ship, does not import *ex the ship* by which *it is to be shipped*, but only means *ex* a ship of some kind.

The contract, however, concludes with *no arrival, no sale.* All of the duty of the purchaser must be wrapped up in that one word *arrival.* Of what? It is, therefore, a contract of sale conditional on arrival, and therefore within that class of contracts. What then are the rules applicable to such contracts? We cannot hope to improve on Mr. Benjamin. He says:—

SECTION 578. A very frequent contract among merchants is a sale of goods "to arrive." It is not always easy to determine whether the language used in such cases implies a condition or not, or what the real condition is. The earlier cases were at *nisi prius*, but in recent times these contracts have been multiplied to a great extent. * * *

SECTION 586. It appears from this review of the decisions that contracts of this character may be classified as follows: *First.*—Where the language is that goods are sold "*on arrival per* ship A, or *ex* ship A," or "*to arrive per* ship A, or *ex* ship A" (for these two expressions mean precisely the same thing), it imports a *double condition precedent*, viz., that the ship named shall arive, *and* that the goods sold shall be on board on her arrival. *Secondly.*—Where the language asserts the goods to be on board of the vessel named, as "1170 bales *now on passage*, and expected to arrive *per* ship A," or other terms of like import, there is a warranty that the goods are on board, and a *single condition precedent*, to wit, the arrival of the *vessel. Thirdly.*—The condition precedent that the goods shall arive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor, and with which he did not affect to deal; but *semble* the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him. *Fourthly.*—Where the sale describes the expected cargo to be of a particular description, as "four hundred tons Aracan Necrensie rice," and the cargo turns out on arrival to be rice of a different description, the condition precedent is not fulfilled, and neither party is bound by the bargain.

The contention below may be repeated in this court, that there is nothing necessarily indicating that the arrival by the particular ship is intended by the words *no arrival, no sale*, and, therefore, this is not within the class. We have, therefore, selected instances which are classified under this head and are held to include the arrival of the vessel. In fact, we have discovered no instance in which the words have been confined to an arrival of the goods only.

Idle *vs.* Thornton, 3 Camp., 274, there was a B. & S. note for two hundred casks tallow on arrival concluding *ex* "Catherine Evers." There is no allusion to the ship except in this way. The seller got the tallow, the ship having been wrecked, and sold it. But he was held not liable to the purchaser for non-delivery, and Lord Ellenborough points out the consequences, as we have already endeavored to do, viz., if arrival by the ship was not the condition the seller would have been bound to forward it at whatever hazard or expense. Shields *vs.* Pettie & Mann, 4 New York (4 Coms.), 122, was a sale of one hundred and fifty tons on board "Siddons," and it was held this meant an agreement to sell on arrival of the ship with the iron on board. Same point, 3 Wend., 112. Johnson *vs.* McDonald, 9 M. & W., 600, a sale of one hundred tons to arrive *ex* "D. Grant," imports a double condition, and unless the ship has the goods on board there is no sale. Stockdale *vs.* Dunlap, 6 M. & W., 226, to arrive by the "Maria." The goods arrived, having been transshipped from the "Maria" when she was wrecked. The purchaser is not entitled to demand delivery.

Parke, B., says in Johnson *vs.* McDonald, 9 M. & W., page 604, that *to be completed on arrival, to arrive*, or *on arrival* all mean the same thing, and imply the double condition of both ship and cargo arriving, *and the cargo being on the ship.*

Lovatt *vs.* Hamilton, 5 M. & W., 639, to arrive *per* "Mansfield." The vessel arrived and the goods arrived, but not on board the "Mansfield." The seller was discharged from the duty to deliver. Hawes *vs.* Humble (note), 2 Camp., 328. One hundred tons on arrival in "Your Bon Fim," creates a double condition, and the only remedy for voluntarily

preventing the arrival by not shipping is by an action of deceit. That is, an intentional evasion alone can prevent the seller setting up the condition in discharge of his obligation.

All the authorities, therefore, show that words indicating that *arrival* is a condition of a sale of goods that are to come by a ship, mean arrival by and in that ship. When it is so worded as not to exclude one of these conditions, as, for instance, on the arrival of a ship, without words indicating that the cargo was to come by or on that ship, then it is an absolute contract to sell if the ship arrives, though there is nothing in her. Hale *vs.* Rawson, 4 C. B., N. S., 85. It is, therefore, a mere question of construction as to what are the conditions, arrival of ship or of cargo, or of both; but the authorities all agree that unless the words exclude the construction, the condition to arrive, if a ship is named, means arrival of that ship with the cargo.

II. Was the delivery by the "Trinidad" a delivery by the "Empress of India" for the purposes of this contract?

1. That it was for the purpose of enabling the "Empress" to earn the agreed freight is nothing to the purpose. There is no connection between the contract to sell and the contract with the carrier *to carry*.

A commonplace phrase is here called in aid and misapplied. The master is the agent of all concerned. It has nothing to do with the case. It applies perfectly to the seller, who was the owner, and to the insurer, and to any one having a right in or to the sugar, but we had none. We could not insure; we had no insurable interest. Stockdale *vs.* Dunlap, 6 M. & W., 224, decides the very point.

2. This right is not always a duty, it is an *optional right*, and may be a duty, but can it be exercised against the will of the owner of the cargo? Certainly not. It is not only optional, but the seller may elect to accept, paying freight *pro rata itineris*, and compel delivery then.

The English and American doctrines vary as to the *duty* of

the master to forward. But in this case there was no duty even under the American rule. It required a journey to New York to get a ship. Flanders on Shipping, section 240, and by all the authorities, the right of the shipper to prohibit the transshipment is very clear.

*Id.*, section 241;

3 Johns., 327, Griswold *vs.* N. Y. Ins. Co.

Whose agent then was the master? How could he be agent for one not having an interest in the cargo? He was agent of the shipowner to earn the freight, say all the authorities.

3. But what possible bearing has this on the case? It is not a question whether the carrier has performed his duty, but has a condition happened?

Suppose the contract had been to buy the "Empress of India" on her arrival with that cargo? Would this be a performance of that condition?

4. If the delivery by the "Empress of India" was a condition, it is not performed by a delivery by a substitute, however lawful or proper the substitution was.

If the "Empress of India" had landed a part of the cargo at Bermuda, and brought the rest forward, and then gone back for the rest, that would not have been a performance of a duty to carry by that vessel. Ritchie *vs.* Atkinson, 10 East., 303. How then can it be possible that the duty could be performed by transshipping because of unseaworthiness?

5. It is altogether a mistake to apply the rule of the carrier. That depends on his duty to do the best he can when the intended means fails. This is a question of liability depending on events happening, not on whether there have been legal substitutes or a different mode of performing, but have the events happened?

If the parties stipulate for delivery by a certain vessel, there can be no other delivery substituted for it. Bowes *vs.* Shand, 2 Appeal Cases, 455, 63, 65, 68, 74, 75, 76, 79, 80; Cleveland *vs.* Rhodes, 121 U. S., 255; L. R., 2 Ex., 197, per Martin, B.

Contrast what is said by Lord Ellenborough, in reading a contract like this, with the ruling that admits this substitute as a performance. Idle *vs.* Thornton, 3 Camp., 276. "In construing a contract like this, I must consider that it was the intention of the parties that it should be void unless the commodity *in the ordinary course of trade and navigation* arrived at the port of destination by the appointed day." The words italicised are the key to this contract.

In place of this, we have the contract "is to be binding if by any process, the most unexpected and unlooked for, a substitute is found for the mode of performance, *and though this is against the will of both the parties to the contract.*"

"They must submit to this mode of performing a condition precedent, because the carrier had a right to do this to earn his freight and the seller refused to discharge him."

Which of the parties anticipated the possibility of a transshipment? If they did, would they not have stipulated on the subject? Would they have left it optional with the seller, but binding on the purchaser?

The claim that the substituted mode of performance was a performance was pressed at the trial, and possibly accepted for the reasons there assigned.

1. It was contended that it was no part of the contract that the goods should come by any particular vessel. We think Baron Parke's suggestion is the true rule. It is not a contract; it is a condition. Turn it into contract and what becomes of the sellers? There is no exception because of the perils of the sea.

2. An alternative mode was permissible.

3. The contract required the shipment to be on this vessel; hence, any performance consistent with the duty of the owner of that vessel under the charter was a performance for the purchaser as well as for the seller.

All of these but the last are evidently answered if the contention that the sale was conditional, and if the condition was as we have sought to maintain. The first and second are absolutely inconsistent with the plaintiffs' construction as proved by his own evidence. If an alternative mode of shipping was

admissible, what conceivable objection was there to the sellers directing a transshipment? That they could not do this, Ritchie *vs.* Atkinson, 10 East., 303, proves. This is founded on the common logical fallacy of substituting false for correct postulates. In place of the question, what are the duties of the seller, which must be performed before he can demand acceptance under the contract of sale, there is substituted, what are the duties of the carrier to the seller in performing his charter? The purchaser was a stranger to that person and that contract. The seller as between himself, the carrier, might have made what contract he pleased. And it is plain if there was nothing indicating that the mode of performance was a condition to the sale, the purchaser had nothing to do with this. If so, what becomes of the evident stipulation for steam and excluding sails?

But the third combines two plausible errors. 1. It implies that the carrier was the agent of the purchasers. He stood in no relation to them of any kind whatever. They had not even an insurable interest in the sugar. 2. The loose use and misapplication of a phrase, viz., that the carrier is the agent of all concerned. This is found in Christy *vs.* Row, 1 Taunt., 300. It is there asked (315) by Mansfield, C. J., where a voyage is defeated for unexpected reasons not within the control of any one (restraint of princes) what shall be done?—he "certainly is not justified in throwing the cargo into the ocean. The books throw no light on the matter. *The natural justice of the matter seems obvious that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned.*" Now the material point here is, who are *the concerned?* It means the persons having an ownership in the goods or entitled to carry them and earn freight, or an insurer.

It must be borne in mind that the proposition was a perfect novelty to this great judge in 1808. He does not seem to be aware that it had been ever discussed. He says (page 315) *the books throw no light on the subject.* Emerigon, in the edition of 1783, has a section on this *changement de vaisseau*, vol. I., chapter 12, section 16, page 423, of the edition of 1783. This

supposed novelty may well be the reason for the vagueness of the expression as to the persons for whom the *agency* exists, and still more as to the persons for whom it is to be assumed to have been exercised, if it is exercised at all.

The use of the phrase by the subsequent authorities shows this, and the well-settled rules in reference to the rights of shippers and carriers prove it, and exclude the notion that a person having that sort of relation to the goods as these purchasers had have anything to do with it; they are not *the concerned.* Thus in the Cargo *ex* "Argus," L. R., 5 P. C., 164, the phrase is at once changed by Mr. Justice Montague Smith to the *scope of the duty of the master as agent for the merchant* (the shipper). He says: *Out of this arises the correlative right to charge for expense*, and note this agency exists only when he cannot get advices. Page 165. In the present case there was a consultation and election by the owner of the ship. The master's right to forward depended on another consideration altogether, viz., his right to earn the freight, so that he here acted as agent for the owner of the steamer against the wishes of the owners of the cargo. Nor was he even asked to consult the purchasers. In Australasian, &c., Co. *vs.* Morse, L. R., 4 P. C., 222, it is ruled not only must the master consult when it is possible, but he must obey the instructions; "he is not entitled to substitute his own judgment for the *will* of the owner in the strong act of selling the goods where it is possible, as hereafter explained, to communicate with the owner and ascertain his *will.*" Page 228, *sub fine.*

This very distinctly defines the nature of the agency created by the law, and shows the absurdity of claiming that the master in this case was an agent of the purchasers. He not only did not consult them, but the sellers did not request him to do so, and he was doing the most injurious thing for them that lay in his power. That he acted rightly and lawfully is not questioned, but it is because he was agent of another and a very different interest.

The person for whom he is agent is ascertained by looking at his conduct and the motives. Notara *vs.* Henderson, L. R., 7 Q B., 225, 35, where damaged goods were retained on board

and carried from the intermediate port rather than deliver them to the owner there, who offered to pay *pro rata* freight, he was held to be acting for the shipowners, in order to earn full freight.

The rule as to transshipment illustrates this point, the English rule being that it is optional with the master, the European and American being that it is compulsory if it can be done. If it be compulsory, says Lord Denman (page 333), the duty arises out of the original contract; if it be permissible only, it is to enable him to earn the freight. Shipton *vs.* Thornton, 9 Ad. & Ell., 314. Another illustration is in the rule that after abandonment of the ship the contract to transship is not made as agent for the underwriter on the ship, for that has ceased to exist; it is on behalf of *his owners* to enable them to earn the agreed freight. Hickie *et al. vs.* Rodocanachi, 4 Hurlst & Norm., 455. The contract is made on behalf of the owner or the freighter. Manheim *vs.* Gibbs, 7 Jur., N. S., 186, and which he acts for is to be judged by his conduct.

There is another rule in reference to transshipment which proves that the master is the agent, first, of the owner of the goods, and, secónd, of the owners of the ship; certainly not of the person entitled to buy them if they arrive. It is that the owner of the goods may forbid transshipment and compel delivery at the port of distress. It is only when the shipper refuses to pay the full freight that the master may elect to transship in order to earn the freight. Vlierboom *vs.* Chapman, 13 M. & Welsby, 230; Chitty on Carriers, 201–2, and the numerous authorities cited there. In case of shipwreck he becomes the agent of the freighter. Chitty on Carr., 160, citing Emerigon. The meaning is, the master may sell. Lord Esher, "The Industrie," L. R. (1894), Probate, 69.

How can he be the agent of one who has not even an insurable interest in the goods or the ship; or for one who could not possibly sue for misconduct in respect of them? That it is the owner of the cargo that he becomes agent for is shown by The Soblomsten, 1 Ad. & Eccl., 293.

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It seems to us impossible, therefore, to treat the purchasers as affected by this act of the master because of any relation he

bore to them. If this transshipment was a performance of the condition, it must be because *arrival* alone, no matter how, was a performance. It is not amiss to point out that the right to transship is now frequently inserted in contracts to arrive, thus showing the sellers here were quite right in saying they had no such right under this contract. Heyworth *vs.* Hutchinson, 2 Q. B., 446; Neill *vs.* Whitworth, 1 C. P., 684–6.

The rights and duties of the carrier arise out of his contract, and the implied obligation of a person intrusted with goods, where, by an uncontrollable necessity, he is left in charge, but is disabled from carrying as he agreed to do.

The rights of the seller under our contract do not depend on these things in any way. They rest on the state of the facts when he proposes to carry out his contract. If the arrival of the goods is the one condition the mode of getting them there is immaterial. If the mode constituted a part of the condition the legitimacy of a substituted mode has nothing to do with it. To treat the arrival of the "Trinidad" as an arrival by the "Empress of India" is to mistake altogether the meaning of the phrases. The "Trinidad" was a substitute for the purposes of insurance on the cargo, because it is a form of salvage from a peril insured against. 3 Douglass, 1; Plantmour *vs.* Staples, S. C., 1 Term, 611, note. Just as forwarding by rail would have been if the ship had gone ashore, and also for the purpose of the carrier to complete his contract as far as he can. The contract of sale was not intended to insure or procure the carriage of the cargo. The object was to define a duty dependent on the happening of an event. A change in the words will exhibit our meaning clearly, If this contract means, I will buy the cargo if it arrives in the "Em-"press of India," or on condition it does arrrive, there is no liability. If it means, should this cargo be delivered pursuant to the carrier's contract I will buy it, there is a liability. The question of propriety or legality of the substituted mode of performance has no bearing if arrival *per* or *ex* ship is a condition. The question is, what is the definition of the terms on which we were bound to purchase? It was a chance, but it arose out of the wording of the contract, and hence we have a right to insist on it. 2 Appeal Cases, 477.

But besides these considerations the fact that the seller had the option to prevent the transshipment is conclusive, because the moment the seller's duty to deliver became optional, the purchaser's obligation to receive is optional also, because mutuality is the only consideration for the obligation to deliver. Vernede *vs.* Weber, 1 H. & Norm., 311. This optional right is very important. The shipper is bound to pay the increased freight, because the master is his agent in making the contract for anything beyond the original sum, 3 Kent Com., 212, and by him as chancellor, 4 Johns Ch. R., 224, Searle *vs.* Scovell, and it is of the utmost importance that he shall be at liberty to discharge himself from this, as he can always do by accepting the goods at the port of distress. If the seller has the option to perform or not, and he certainly did have this right when the goods arrived at the Bahamas, it is impossible to construe a contract like the one sued upon, as intended to compel the buyer to take the goods, irrespective of the method of their delivery. Such construction would turn a contract which would be mutually obligatory if held to cover an arrival in the steamer of shipment into one permitting the vendor, upon the happening of a contingency requiring transshipment, to deliver or to retain the goods at his pleasure.

The real question is, therefore, does *no arrival*, no sale, import an arrival by the particular ship named as the one on which the cargo must be loaded? If another mode of reading the contract suggested by the plaintiff at the trial is accepted, this objection of the absence of mutuality is apparent.

It was said the sellers undertook to load, and if the goods arrived then there was to be sale, otherwise not. Suppose this had been proposed, the purchaser might have asked, If the ship cannot complete the voyage will you undertake to forward? Will you undertake that the captain will? If you will not you are asking me to purchase if it is advantageous to you to transship, or to the shipowner. Is that mutuality? What do I get for that risk? nothing but the chance of a loss. If it is advantageous not to transship, will you or the master do it? Certainly not. Therefore you must bind yourself to

transship, or I am to be at liberty to disclaim anything if you do.

In fact, if we discard the uniform rule in England founded on Baron Parke's suggestion, we have a stipulation for loading in a particular steamer, which is a condition, but *quâ* all that relates to the mode of transportation, there is neither contract nor condition. The seller, in the event of disaster, and the shipowner, are each given an option as to that, but not the purchaser. Which is the more reasonable construction of a contract resting on mutual promises?

In the case of Iasigi *vs.* Rosenstein, 20 N. Y., Supplement 491, and 65 Hun., 591, the contract read as follows:—

NEW YORK, March 14th, 1887.

Sold for account Messrs. Iasigi & Co., of Boston, to Messrs. C. Rosenstein & Co., five hundred bags good merchantable quality Smyrna canary seed, March steamer shipment from Turkey, at two and three-quarter cents per pound gross weight for net, less one per cent. for cash in ten days from date of delivery on dock in New York. No tare; no charge for bags. Goods to be taken from dock on arrival of steamer when ready for delivery. Damaged bags, if any, to be taken at fair allowance. Name of steamer to be given soon as known.

GEORGE M. BLACK,
Broker, 60 New Street.

Indorsed: "Accepted, New York, March 16th, 1887.

"C. ROSENSTEIN & CO."

Second indorsement: "Name of steamer reported, 'Aleppo.' No "arrival, no sale. New York, April 22d, 1887.

"GEORGE M. BLACK,
"Broker."

The General Term just decided:—

It must be regarded as settled law that where contracts are plain, unambiguous, and easily understood, no proof of custom or evidence extrinsic of the contracts themselves can be resorted to, it being the duty of the court to give to the language employed its ordinary and reasonable meaning. Another well recognized rule of construction is that no evidence of custom or usage is competent to vary or contradict the express terms of a written contract, resort to custom and usage being permissible only where it is necessary to supply an omission or annex an incident entirely consistent with the written terms of the contract. As stated by Starkie on Evidence, page 710: "In "many instances evidence of custom and usage is admissible for the

"purpose of annexing incidents to the terms of a written instrument "concerning which the instrument is silent, although if any condition or "term in the contract is necessarily repugnant to or inconsistent with the "custom, the latter is excluded." It is true that merchants contract ordinarily with reference to established customs and usages in their particular business; and where the contract is not in writing, or, if in writing, an ambiguity exists therein, or the contract is silent as to some incident connected therewith, it is competent to have resort to custom or usage for the purpose of showing what the contract made between the parties was. Notwithstanding, however, the existence of customs and usages in a trade or business, it is perfectly competent for the parties to enter into a written contract whose terms are inconsistent with such usages. And when the terms are clear and unambiguous, and, by giving to the language employed its ordinary and well-defined meaning, but one construction is open, it is clear that the terms of the agreement cannot be impaired or destroyed by evidence extrinsic of the contract relating to custom or usage. We think that the contract here, fairly construed, regard being had to the language used, was one by which the plaintiff contracted to sell the seed to arrive by the steamer "Aleppo" from Turkey to New York; and that evidence tending to show a custom of the trade or that vessels never came directly from Turkey to New York, would be permitting the plaintiff to interpolate into the contract terms which would change the construction that the language used would require us to give to it. It is insisted by appellant that whether the seed came from Turkey directly by the "Aleppo," or was transshipped at Liverpool to another vessel, is unimportant, and should not have attached to it weight sufficient to justify a rejection by defendant of the contract. Our attention is called to the fact that the answer does not allege that this circumstance of the change is of any consequence, and that it does not state any facts to show that it was of any importance, pecuniarily or otherwise, to the defendant; it being conceded, moreover, that in all other respects the seed tendered and rejected complied fully with the description contained in the express terms of the contract. We are not at liberty, however, to determine the relative importance of terms in a contract, nor have we the power to reject any provision of a contract which the parties themselves have inserted, and which they may have deemed important; nor in any action such as this was it necessary for the defendant to show in what respect he was injured by such change.

The plaintiff brought this action to recover damages for a breach of the contract, and before a recovery could be had in such an action it was essential for him to show that he had fully complied with all the terms and conditions of the contract to be performed on his part. The question, however, as to whether the manner of shipment is important has been passed upon adversely to the position assumed by the appellant in many cases, and it has been held that the mode of shipment is not an immaterial or unimportant accessory "affecting only the method of

"performance, but is of the substance of the agreement because identify-"ing its subject matter." (Bidwell *vs.* Overton, Com. Pl. N. Y., 13 N. Y. Supp., 274. See also Benj. Sales, sections 588, 600; Hill *vs.* Blake, 97 N. Y., 216; Welsh *vs.* Gossler, 89 N. Y., 540.) Here the means of identifying the seed the defendant agreed to purchase was the arrival of the "Aleppo" with such seed on board, and seed, even of the same quantity and quality brought to New York by any other steamer than the "Aleppo," would certainly not be the seed the defendant contracted to purchase from the plaintiff, the words as to the mode of shipment being part of the description of the subject matter. Benj. Sales (section 588) says: "In sales of goods to arrive it is quite a usual condition that "the vendor shall give notice of the name of the ship on which the goods "are expected as soon as it becomes known to him, and a strict compliance "with the promise is a condition precedent to his right to enforce the con-"tract." Certainly the failure to give the name of the vessel in a case where the goods in all other respects answer the description of a contract is no more important than a provision in the contract relating to the mode of shipment. If we were at liberty to determine their relative importance we should say that more was to be attached to the mode of shipment than to the name of the vessel; because, while both were intended for the purpose of identifying the property, the mode of shipment might have, in case of loss, an important bearing upon the question of the insurance upon the cargo, and a change in the mode of shipment might result in a forfeiture of the policy. In this case the name of the vessel having been ascertained to be the "Aleppo," and having in the last contract expressly agreed to a shipment from Turkey by the "Aleppo," had the defendant taken out a policy of insurance covering any interest which he might have in the seed to arrive, under the usual terms and conditions of such a policy, unless arrangements with the insurance company were made for transshipment at Liverpool, the policy could not have been enforced if a loss had occurred to the goods during their transit from Liverpool to New York. Apart, therefore, from the method of shipment being a necessary part of the description, we have suggested one way in which we think the defendant might have been injuriously affected, and in respect to which the method of shipment would be an important term or provision of the contract. It is true that under the contract here, providing "No arrival, no sale," the defendant might have no insurable interest. We are discussing, however, the bearing which the presence of such a condition, in the absence of express stipulations in the contract to the contrary, would have upon the rights of the parties. It is unnecessary, however, to further discuss the question, it being sufficient for this appeal to say that a fair and reasonable construction of the contracts having required a direct shipment from Turkey to New York on the "Aleppo," it could only be fulfilled by the arrival of such vessel in New York. Such construction being clearly and plainly indicated by the language used in the contracts, it was not competent to resort to evidence of custom or usage to vary their terms. We

think, therefore, that the learned trial judge properly excluded such evidence of custom, and that, in the absence of such evidence, the plaintiff having failed to show a compliance with the term in regard to the mode of shipment from Turkey to New York, the complaint was properly dismissed. The judgment should therefore be affirmed, with costs.

Whilst it is true that this case was reversed by the Court of Appeals in 141 New York, 414, such reversal rested solely upon a different idea of the Appellate Court as to the right to introduce evidence of custom. In the opinion of the Appellate Court it will be found that there is there a practical admission that the vendee was not liable if the goods did not arrive.

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